83-858

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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

Leonard Ray Blanton,

Petitioner,

v.

United States of America,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Against the backdrop of massive, adverse pretrial publicity, was the abbreviated voir dire conducted herein violative of Petitioner's rights to a trial before a fair and impartial jury contrary to the guaranties of the Fifth and Sixth Amendments to the United States Constitution?

PARTIES TO PROCEEDINGS IN THE COURT BELOW

The United States, as Plaintiff-Appellee, and Petitioner Leonard Ray Blanton plus Clyde Edward Hood, Jr. and James M. Allen, as Defendants-Appellants, were the only parties to the proceeding in the United States Court of Appeals for the Sixth Circuit below.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

LEONARD RAY BLANTON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Leonard Ray Blanton, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in United States of America v. Leonard Ray Blanton, Clyde Edward Hood, Jr. and

James M. Allen, No. 80-30253, entered on the 28th day of September, 1983.

OPINIONS BELOW

The judgment of conviction of the United States District Court for the Middle District of Tennessee, dated August 14, 1981, is unreported and is reprinted here as Appendix A hereto. The opinion of a panel of the United States Court of Appeals for the Sixth Circuit reversing the conviction, rendered February 11, 1983, is reprinted here as Appendix B hereto and is reported at 700 F.2d 298. The opinion of the Court of Appeals upon a Petition for Rehearing En Banc reinstating the conviction is reprinted here as Appendix C hereto and is not yet reported.

JURISDICTION

The final judgment of the Court of Appeals en banc was filed September 28, 1983. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

> Amendment V: No person shall be * * * deprived of life, liberty or property without due process of law * * *
>
> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

STATEMENT OF THE CASE

Petitioner was charged in an indictment issued October 29, 1980, with eight counts of mail fraud [18 U.S.C. §§ 2,

1341], one count of violating the Hobbs Act [18 U.S.C. §§ 2, 1951], one count of conspiracy [18 U.S.C. § 371], and two counts of tax evasion and filing a false tax return, the latter two counts being subsequently severed.

On March 12, 1981, a superseding indictment issued, adding an additional mail fraud count.

The essence of the offenses imputed to Petitioner was that he, while serving as Governor of the State of Tennessee, directed that liquor licenses be awarded to political friends, an object allegedly accomplished by appointing two of the three Commissioners of the Alcoholic Beverage Commission, which has exclusive jurisdiction respecting the issuance of liquor licenses in Tennessee. The evidence against Petitioner was virtually, if not exclusively, a videotaped

deposition of one Jack Ham, an immunized witness who had received a liquor license during Petitioner's tenure as Governor and who had allegedly agreed to give Petitioner a portion of the profits of his liquor store, i.e., 20% of such profits. It was conceded that Ham made no payments to Petitioner. Respondent nevertheless contended that a sale of oil stock by Petitioner to Ham for $23,000.00 represented a "payment" since the price paid by Ham for such oil stock was allegedly in excess of its market value, an issue of fact which was vigorously disputed by Petitioner.

On the theory that this scheme violated Tennessee's liquor laws against public officials having an interest in a liquor store [T.C.A. § 57-3-210(b)(1) (1980)], or an undisclosed interest in a liquor store [T.C.A. § 57-3-210(f) (1980)], and the bribing of public officials [T.C.A.

§ 39-802 (1975)], a federal charge was leveled that the acts constituted a conspiracy to defraud the United States by the use of the mails in furtherance of Petitioner's alleged scheme to violate Tennessee law [18 U.S.C. § 371]; and when coupled with mailings by the Tennessee Alcoholic Beverage Commission respecting notices of hearing and the like constituted mail fraud in that the citizens of Tennessee were deprived of the honest services of a government official [18 U.S.C. §§ 2, 1341], and further violated the Hobbs Act [18 U.S.C. §§ 2, 1951] in the light of the position of the Petitioner as Governor of Tennessee.

As the panel opinion herein, adopted in pertinent part by the majority opinion of the Court below, noted [App. B., p. 8a]:

> The trial [in Nashville] was preceded by massive publicity about the case in Nashville, Tennessee, and throughout the state, as one

would expect in the trial or a former governor. The record contains over 240 articles from Nashville newspapers adverse to defendants. There are approximately 160 articles which appeared in the six months preceding the trial about the instant prosecution, the prosecution of Blanton's brother, and the prosecution of former Blanton aides. There are more than seventy-five other articles which appeared while Blanton was governor concerning his administration. There are another twenty-two articles on the deposition of Jack Ham, the last of which appeared four months before the beginning of the trial. A large part of the original indictment was published verbatim in the Nashville newspapers. There was also an offer of proof concerning the testimony of news directors of three Nashville television stations about the pretrial publicity. There can be no doubt that there was an extraordinary amount of pretrial publicity concerning this case and other cases involving officials of the Blanton administration and some of Blanton's relatives.

The selection of a jury commenced on April 20, 1981, with the Trial Court conducting the voir dire en masse. The testimony commenced in the case April 22, 1981, and concluded May 29, 1981. The

jury deliberated until June 9, 1981, and found Petitioner guilty on all eleven counts. Petitioner was sentenced to three years and was fined $11,000.00.

Upon appeal to the United States Court of Appeals for the Sixth Circuit, a panel consisting of The Honorable Albert Engel and The Honorable Damon Keith, Circuit Judges, and The Honorable Floyd Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation, reversed Petitioner's conviction, concluding that the Trial Court inadequately probed the opinions jurors might have formed as a result of the massive, intense publicity which had preceded the trial, operating to impair Petitioner's right to a fair and impartial jury "as shown on the record." [App. B, p. 32a]

The government responded with a

Petition for Rehearing En Banc, which was granted April 7, 1983.

The decision of the Court of Appeals, consisting of Chief Circuit Judge Edwards and nine Circuit Judges, reversed the panel, with Circuit Judges Engel, Martin, Jones and Keith dissenting.[1/]

REASONS RELIED UPON FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with prior expressions of this Court which disapprove unduly restricted voir dire where the veniremen have been exposed to prejudicial publicity.

The Conduct of the Voir Dire

We adopt the panel's description of

1/ Circuit Judge Keith filed a separate dissenting opinion [App. C, pp. 93a-96a], Circuit Judge Kennedy filed a separate concurrence in the majority opinion [App. C, p. 66a].

the voir dire, which was adopted by the majority opinion of the en banc Court of Appeals:

> The trial court conducted the voir dire en masse. It seated a group of veniremen in the jury box and directed questions at that group, but instructed the rest of the veniremen in the courtroom to listen to and pay attention to the questions as the questions would apply equally to all those selected. During the course of the voir dire the trial court pointed out that the case had been the subject of considerable media attention. It commented that it was sure that all the veniremen had heard about the case, and that some of them may have formed a tentative opinion concerning the probable guilt or innocence of the defendants: The court then said to the veniremen:
>
> > [T]he test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?
>
> One juror was excused because she indicated she could not be impartial. As new veniremen entered the jury

> box to replace the ones who were excused for whatever reason, the trial court would ask them essentially the same question on pretrial publicity. It usually said it wanted to "particularly emphasize" the point. Out of ninety-two veniremen examined, a total of thirteen were excused because they indicated they had an opinion or prejudice they could not put aside. Of these thirteen, four linked their prejudice to pretrial publicity. Seven of these thirteen were excused when they said they had an opinion, without the court inquiring into the nature or strength of the opinion or whether it could be put aside. Twenty-nine other veniremen were excused for cause for other reasons and the parties excused twenty-eight others with their peremptory challenges. [App. C, pp. 40a, 41a.]

To read the lack of detail in such voir dire is to realize its total inadequacy in terms of detecting prejudice on the part of prospective jurors as the result of exposure to hostile pretrial publicity. For what the Trial Court did was to address the venire en masse in a packed Courtroom with a general question relating to pretrial publicity and to

thereafter accept the silence of the veniremen as an assurance of impartiality.

The Trial Court refused to ask or to permit the asking of any comparable questions in relation to the exposure of the veniremen to pretrial publicity, their knowledge concerning the case, opinions formed as to the guilt or innocence of the Petitioner as the result of such exposure and the intensity of any such opinions. And this despite the recognition by the Trial Judge that: "It is entirely likely that some of you have formed a tentative opinion concerning the probable guilt or innocence of some of these defendants." [R. 56.]

This abbreviated voir dire ignores the teaching of Irvin v. Dowd, 366 U.S. 717, at 723, where this Court said in relevant part:

> [T]he 'essential function of voir dire is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel.' A trial court commits reversible error if, by unduly restricting voir dire, it substantially impairs the peremptory challenge right. Where veniremen have been exposed to prejudicial publicity, the nature and degree of that exposure is certainly a matter of legitimate concern to a defense attorney in deciding on peremptory challenges.

And certainly in deciding upon challenges for cause.

For in circumstances such as those here presented, where the trial was conducted in the wake of massive adverse pretrial publicity, there was a constitutional demand for "searching questioning" of prospective jurors conducted as an alternative to prior restraint of publication when pretrial publicity creates a substantial risk of juror prejudice. Sheppard v. Maxwell, 384 U.S.

333, 354-55 (1966); Reynolds v. United States, 98 U.S. 145, 156 (1878); Aldridge v. United States, 283 U.S. 308, 310. This requirement has been imposed by this Court in balancing the constitutional concepts of a free press against a fair trial in prior restraint cases.

As Circuit Judge Engel put it in his dissenting opinion:

> To my knowledge, no court of appeals has ever before affirmed a conviction in a case of widespread and inflammatory pretrial publicity when the entire voir dire concerning publicity consisted of a single question eliciting only a juror assurance (through silence) of impartiality: *** (Emphasis supplied) [App. C, p. 69a.]

Thus, the dissenting opinion of Judge Engel states that:

> The en banc opinion today establishes a new rule of law governing jury selection in federal trials involving widespread pretrial publicity.
>
> That new rule is that where

> inflammatory pretrial publicity is pervasive, inquiry into an individual juror's knowledge and predisposition is superfluous. *** The en banc opinion further imposes upon the defense the burden of proving prejudice although the trial court effectively precluded any meaningful inquiry needed to establish it. *** [App. C, p.67a.]

Thus, the procedure countenanced by the Court of Appeals is at once in the teeth of principles established by this Court and flouts Petitioner's right to a reasonable opportunity to secure a disinterested jury--a right guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

2. The decision of the Court of Appeals conflicts with the uniform federal appellate view that a juror may not determine his own lack of partiality.

This Court recognized in Murphy v. Florida, 421 U.S. 794 (1975), that:

> *** [T]he juror's assurance that he

> is equal to this task (of laying aside impressions or opinions) cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'

See also Irvin v. Dowd, supra, and Marshall v. United States, 360 U.S. 310.

As the Court said in Dowd:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.' ***

366 U.S., at 728.

The Fifth Circuit in United States v. Davis, 583 F.2d 190, 197 (C.A. 5, 1978), noted that a juror "is poorly placed to make a determination as to his own impartiality. Instead, the trial court should make this determination."

The Fifth Circuit reached a similar conclusion in United States v. Hawkins, 658 F.2d 279, 282-85 (C.A. 5, 1981). And the Second Circuit, sitting en banc, in United States ex rel Bloeth v. Denno, 313 F.2d 364, 371-73, cert. den. 372 U.S. 978 (1963), held that jurors' assurances of impartiality despite opinions formed by pretrial publicity were totally insufficient and that a change of venue was accordingly constitutionally required.

The Ninth Circuit in Silverthorne v. United States, 400 F.2d 627, 637-40 (1968), held that where every juror had some knowledge of the case, the jurors' assurances of impartiality were insufficient and that the jurors should have been questioned individually.

The Seventh Circuit in United States v. Dellinger, 472 F.2d 340, 367-70, cert. den. 410 U.S. 970 (1973), similarly found

juror assurances inadequate, as did the First Circuit, albeit in dicta (see Patriarca v. United States, 402 F.2d 314, 318 (C.A. 1, 1968), cert. den. 393 U.S. 1022 (1969).

In United States v. Caldwell, 543 F.2d 1333, 1345-46 (D.C. Cir., 1974), cert. den. 423 U.S. 1087 (1976), the District of Columbia Circuit noted that in certain circumstances jurors' assurances of impartiality were insufficient, while pointing out that it had not found a case where the District Court procedures employed in such Circuit were inadequate. See, e.g., United States v. Liddy, 509 F.2d 428, 436-37 (D.C. Cir., 1974), where veniremen who indicated they might have formed an opinion were questioned individually; and United States v. Bryant, 471 F.2d 1040, 1044 (D.C. Cir., 1972), cert. den. 409 U.S.

1112 (1973), where again individual questioning was conducted of veniremen who responded affirmatively to general questions.

Thus, the panel opinion [App. B, p. 18a] correctly concluded that:

> This survey of the cases from nearly every circuit suggests less deference to a juror's assessment of his impartiality than the Sixth Circuit implied was appropriate in Johnson (United States v. Johnson), 584 F.2d 148. It appears that the Second, Fifth, Ninth and Eleventh Circuits would reverse in a case like the one at bar. Dicta from the First and District of Columbia Circuits indicate they would reverse. The Third, Seventh, and Tenth Circuits expressed suspicion of jurors' assurances of impartiality, but the facts in the cases from those circuits differ too much from the instant case to determine how those courts would ultimately rule *** (Emphasis supplied.)

Again, as the panel opinion notes:

> No court has approved of questioning as limited as the questioning in this case where there was substantial pretrial publicity. The questioning here can be considered limited only as it relates to the effect of the

> pervasive publicity, and the extent and depth of the individual talesmen's exposure to the massive publicity; otherwise the voir dire was admirably conducted by trial court. [App. B, p. 19a.]

We suggest that a consideration of the totality of the voir dire here involved will persuade that the questioning of the veniremen to determine the impact upon them of the massive pretrial publicity was totally insufficient and that the majority decision of the Court of Appeals would have the effect of sanctioning a deprivation of Petitioner's Fifth Amendment right to due process and Sixth Amendment right to an impartial jury.

And where, as here, the selection of a jury in a manner appropriate to the circumstances of a particular case is essential to the vindication of a defendant's Fifth and Sixth Amendment rights--a recurring question tied to

rights constitutionally guaranteed--this is a decision which must yield to the viewpoints expressed by other Circuits involving the same issue.

3. The Court of Appeals' opinion would impose the burden of proving prejudice upon Petitioner while effectively foreclosing Petitioner's right to ascertain prejudice.

The superficial voir dire had herein developed no information from which defense counsel could determine whether or not to challenge a particular juror for cause.[3/] This information was simply not determinable from the voir dire employed. Defense counsel was armed with no more than the "official questionnaire" containing extremely basic

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3/ Petitioner, in fact, had so little information on which to base his challenges that, in desperation, he hired a clairvoyant to supply at least some basis for exercising his choices.

information respecting prospective jurors. This prejudice was exacerbated by the refusal of the Trial Judge to ask questions concerning the impact of prejudicial pretrial publicity requested both by defense counsel on repeated occasions and, indeed, by the government, which urged the Court "to do some more voir dire on publicity." [R. 101; see App. C, pp. 47a, 63a, 64a.]

Thus, it is a perfect non sequitur for the Court of Appeals to hold on the one hand that Petitioner had not demonstrated prejudice on the part of the jurors while approving a procedure that effectively precluded Petitioner from so doing.

4. Petitioner's right of peremptory challenge was impaired by the voir dire procedure utilized by the Trial Court.

As a result of a lack of information,

Petitioner was required to exercise the peremptory challenges the Trial Court had granted absolutely blindly. It mattered little whether the Trial Judge accorded Petitioner 15 or 50 peremptory challenges. The paucity of information available to defense counsel operated to impair and deny Petitioner the right to peremptory challenges which, under the holdings of this Court, is reversible error without any additional showing of prejudice--prejudice being presumed. See Pointer v. United States, 151 U.S. 396; Swain v. Alabama, 380 U.S. 202, at 219. As this Court said in Swain:

> The denial or impairment of this right is reversible error without a showing of prejudice.

380 U.S., at 219.

Indeed, the Sixth Circuit had previously so held in United States v. Johnson, 584 F.2d 148, thereby joining

the viewpoint of the Seventh Circuit in United States v. Dellinger, 472 F.2d 340 (C.A. 7, 1972).

As we have heretofore demonstrated in accordance with the opinions of this Court and the views of other Circuits, it is recognized that a fair trial in a fair tribunal is guaranteed by the Sixth Amendment and, at the same time, is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955).

The Court of Appeals' duty "to independently evaluate the voir dire testimony of the impaneled jurors," as required by Irvin, supra, at 723, and Aldridge v. United States, 283 U.S. 308, 310, was an impossibility since the truncated nature of the voir dire did not produce testimony regarding the impact of prejudicial pretrial publicity upon the attitudes of the veniremen and silence to

the general question of prejudice was taken as an affirmative representation of impartiality.

As Judge Damon Keith, concurring in the dissenting opinion of Judge Engel, stated:

> I am, frankly, at a loss to explain why the en banc court has approved this voir dire. There are no cases on point which approve questioning so limited as what was permitted in this case. The majority opinion establishes an unwise and dangerous precedent which tampers with basic rights. *** [App. C, p. 96a.]

CONCLUSION

The foregoing decisions and arguments demonstrate that a Writ of Certiorari should issue to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

John S. McLellan
Neal P. Rutledge

Attorneys for Petitioner

Nov., 1983

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were served by mail [by hand delivery] this _____ day of November, 1983, upon the Honorable Rex E. Lee, Solicitor General, United States Department of Justice, Washington, D.C. 20530, counsel for Respondent.

_____
Of Counsel

APPENDIX

APPENDIX A

JUDGMENT AND PROBATION/COMMITMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

UNITED STATES OF AMERICA

v.

LEONARD RAY BLANTON

Docket No. 80-30253 Deft. #1

August 14, 1981

Counsel: Defendant appeared with counsel John S. McLellan.

Plea: Defendant pled Not Guilty.

Verdict: There being a verdict of Guilty as to counts 1 through 11.

Finding & Judgment: Defendant has been convicted as charged of the offenses of Title 18, United States Code, Sections 371, 1341 & 1951.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to

the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on each of Counts 1 through 11. It is further ADJUDGED that the terms of imprisonment on each count are to run concurrently with the other.

It is further ADJUDGED that the defendant is fined the sum of $1,000 on each count, for a total fine of $11,000.

Defendant to remain on present bond pending appeal.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may

change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends,

(no recommendation)

Signed By: /s/ Bailey Brown
BAILEY BROWN
United States District Judge

Date: August 14, 1981

Filed: 12:00 P.M. August 14, 1981
JULIA B. CROSS, CLERK
By: /s/ Jeana Hoset
Deputy

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

JUDGMENT AND OPINION IN

No. 81-5643
No. 81-5644
No. 81-5645

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEONARD RAY BLANTON, (81-5644)
CLYDE EDWARD HOOD, JR., (81-5645)
JAMES M. ALLEN, (81-5643)
Defendants-Appellants.

APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed February 11, 1983

Before: ENGEL, and KEITH, Circuit Judges; and GIBSON, Senior Circuit Judge.*

GIBSON, Senior Circuit Judge. Defendants appeal their convictions for acts relating to the issuance of retail liquor licenses in Tennessee during the administration of the former governor of Tennessee, defendant Leonard Ray Blanton.

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* Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

I. Facts

The three defendants are Blanton, who served as governor of Tennessee from January, 1975 to January, 1979, James M. Allen, who was a special consultant to the governor for the first six months of the Blanton administration and had served as Blanton's campaign manager, and Clyde Edward Hood, who was a special assistant to the governor from January, 1975 to November, 1977. Defendants were charged on October 29, 1980, in a twelve-count indictment with eight counts of mail fraud, (18 U.S.C. §§ 2, 1341 (1976)), one count of violating the Hobbs Act (18 U.S.C. §§ 2, 1951 (1976)), and one count of conspiracy (18 U.S.C. § 371 (1976)). Blanton alone was charged with two counts of tax evasion and filing a false tax return. (26 U.S.C. §§ 7201, 7206(1) (1976)). On March 12, 1981, a superseding indictment was issued adding one mail fraud count. The tax counts against Blanton were severed. The essence of the charges was that defendants used their positions to see that friends of Blanton would receive retail liquor licenses from the Tennessee Alcoholic Beverage Commission (ABC) and that one person paid Blanton for receipt of his license.

The most important evidence against defendants was the videotaped deposition of Jack Ham. Ham was an immunized witness who was the recipient of a liquor license during Blanton's tenure and who allegedly agreed to give Blanton a cut of the profits in violation of state law. Ham had contributed $1,000 to the Blanton campaign.

Blanton's role in the scheme allegedly was that he directed that liquor licenses be awarded to political friends or persons like Ham who offered a cut of the profits. He allegedly accomplished this by appointing two of the three commissioners of the ABC, including the chairman, S. J. King, and the commission was therefore able to appoint Blanton allies as director and assistant director of the ABC. Blanton allegedly agreed to an illegal twenty percent cut of the

profits of Ham's liquor store, with the payment coming in the form of Ham's purchase of allegedly worthless oil stock from Blanton for $23,000.[1] (This method of payment resulted in tax savings to Ham.) Blanton also allegedly approved a transfer of Ham's liquor license to a more lucrative location.

Allen was alleged to have been in charge of determining the awarding of liquor licenses even though he had no position at the ABC. He allegedly helped set up an illegal ownership of a liquor store involving the ABC chairman and he attempted to acquire a concealed interest in a liquor store under the guise of a lucrative consulting contract (only one payment was made under the contract). He allegedly was responsibile for hiring a new ABC assistant director to help control the ABC even though Allen was not even a state employee at the time, and he instructed the assistant director to recommend the transfer of Ham's license to a better location and recommend against the transfer of other persons' licenses to that area.

Hood allegedly planned to acquire an interest in two liquor stores in contravention of various state laws and he received a share of the profits of some of the newly licensed liquor stores. He allegedly told the director of the ABC who Blanton's friends were so that the director would recommend to the ABC that those persons receive licenses. He allegedly helped accomplish the transfer of Ham's license by talking to ABC chairman King and by suggesting a particular person as the assistant director who would persuade the other Blanton appointee on the commission. Finally, he allegedly suggested that Ham pay Blanton's share of the profits by buying the worthless oil stock (although he later advised against the purchase).

---

[1] A total of $38,000 was allegedly paid for the oil stock. In addition to the $23,000 for Blanton's cut of the liquor store profits, Ham and his nephew, Bert Ham, paid another $15,000 as a finder's fee for Blanton's help in getting a loan on a housing project they were building.

The scheme violated Tennessee's laws against an ABC commissioner having an interest in a liquor store,[2] public officials having an interest in a liquor store,[3] undisclosed interests in liquor stores,[4] and bribing of public officials.[5] The federal charge was that the acts (1) constituted a conspiracy to defraud the United States by use of the mails in furtherance of defendants' scheme to violate Tennessee law (18 U.S.C. § 371), (2) when coupled with mailings, constituted mail fraud by defrauding the citizens of Tennessee of the honest services of their government officials (18 U.S.C. §§ 2, 1341),

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[2] Tenn. Code Ann. § 57-1-108(a) (1980) provides: "[N]o person shall be employed in any capacity by the commission, if such person shall have any interest . . . in any . . . retail dealer licensed as such in the state of Tennessee."

[3] Tenn. Code Ann. § 57-3-210(b)(1) (1980) provides:

> No wholesaler's or retailer's license shall be issued to a person who is a holder of a public office . . . . It shall be unlawful for any such person to have any interest in such wholesale or retail business, directly or indirectly, either proprietary or by means of any loan, mortgage, or lien, or to participate in the profits of any such business[.]

[4] Tenn. Code Ann. § 57-3-210(*f*) (1980) provides: "It shall be unlawful for any person to have ownership in, or participate, either directly or indirectly, in the profits of any wholesale or retail business licensed under this chapter, unless his interest in said business and the nature, extent and character thereof shall appear on the application . . . ."

[5] Tenn. Code Ann. § 39-081 (1975) provides:

> Any person who corruptly offers, promises, or gives to any executive . . . officer . . . any gift, gratuity, or thing of value, with intent to influence his act, vote, opinion, decision, or judgment, on any matter, cause, or proceeding which may be then pending, or which may be by law brought before him in his official capacity, shall, on conviction, be imprisoned in the penitentiary . . . .

Tenn. Code Ann. § 39-802 (1975) provides:

> Any executive . . . officer who corruptly accepts, or agrees to accept, any gift or gratuity, or thing of value . . . under an agreement or with an understanding that his vote, opinion, or judgment is to be given in any particular manner, or upon any particular side of any question or proceeding which is, or may by law be brought, before him in his official capacity, or that, in such capacity, he is to make any particular appointment, shall, on conviction, be punished by imprisonment in the penitentiary . . . .

and (3) violated the Hobbs Act (interference with commerce by threats or violence) (18 U.S.C. §§ 2, 1951).

The testimony of the chief prosecution witness, Jack Ham, was videotaped pursuant to Fed. R. Crim. P. 15(a) because of Ham's poor health. The videotape was edited and played for the jury at the trial. The government obtained Ham's testimony offering him immunity from federal prosecution and civil tax liability, and the state agreed not to prosecute Ham. The ABC agreed that it would not revoke Ham's lucrative liquor license on the basis of truthful statements he made in judicial proceedings.

The trial was preceded by massive publicity about the case in Nashville, Tennessee, and throughout the state, as one would expect in the trial of a former governor. The record contains over 240 articles from Nashville newspapers adverse to defendants. There are approximately 160 articles which appeared in the six months preceding the trial about the instant prosecution, the prosecution of Blanton's brother, and the prosecution of former Blanton aides.[6] There are more than

[6] Most of the very negative publicity came shortly after the indictment: "Blanton Faces 12 Counts," Oct. 30, 1980; "Enlist Blanton's Aid in Obtaining Licenses for Future Profits," Oct. 30, 1980; "Allen's Influence Had Wide Impact," Oct. 30, 1980; "Hood's Success, Woes Laid To Misdirected Talent," Oct. 30, 1980; "Blanton-Era Investigations Span 5 years," Oct. 30, 1980; "Blanton Faces Two Federal Court Trials," Nov. 21, 1980. Not all of the articles were negative: "Blanton's Defense Said Good," Nov. 6, 1980; "Friends Eye Legal Fund for Blanton," Nov. 1, 1980. Two months before trial there were articles on the criminal activities of Blanton aides: "Former ABC Head Enters Guilty Plea," Feb. 23, 1981; "Ex-Blanton Aide Enters Guilty Plea," Feb. 25, 1981; "ABC Probing Blanton Associate's License After Kickback Admission," Feb. 26, 1981. The month before the trial began the superseding indictment was issued, prompting more publicity: "Blanton, 2 Aides Indicted Again," Mar. 12, 1981. As late as four days before trial articles linked Blanton to improper pardons of state inmates: "Tapes Link Blanton to 30 Commutations," Apr. 16, 1981; "Taylor on Tape Links Ray Blanton To Clemency Deals," Apr. 15, 1981. Blanton's brother Gene was also in the news shortly before trial because of alleged improprieties: "Gene Blanton To Be Accused of Not Telling $72,000 Income," Mar. 24, 1981; "Gene Blanton Bought Autos With Business Funds, Says Frensley," Apr. 16, 1981. Most of the other articles dealt with procedural aspects of pretrial proceedings.

seventy-five other articles which appeared while Blanton was governor concerning his administration.[7] There are another twenty-two articles on the deposition of Jack Ham, the last of which appeared four months before the beginning of the trial.[8] A large part of the original indictment was published verbatim in the Nashville newspapers. There was also an offer of proof concerning the testimony of news directors of three Nashville television stations about the pretrial publicity. There can be no doubt that there was an extraordinary amount of pretrial publicity concerning this case and other cases involving officials of the Blanton administration and some of Blanton's relatives.

Jury selection began on April 20, 1981. Testimony in the case began on April 22, 1981, and was concluded on May 29, 1981. Closing arguments and jury instructions were completed on June 2, 1981. The court dismissed three mail fraud counts and the Hobbs Act count as to Allen. The jury deliberated until June 9, 1981, and found Blanton guilty on all eleven counts. It found Allen guilty on all the counts the court had not dismissed (six mail fraud counts and one conspiracy count). It found Hood guilty on six mail fraud counts and the conspiracy count, but it found him not guilty on the other three mail fraud counts and the Hobbs Act count. Blanton was sentenced to three years and fined $11,000. Allen was sentenced to two years and fined $14,000. Hood was sentenced to eighteen months and fined $14,000.

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[7] Most of these articles dealt with patronage in the Blanton administration and the pardon of prisoners, including the pardon or commuting of sentences of 52 prisoners, 23 of them murderers.

[8] Some of the articles were entitled: "Ham Details Meetings With Blanton," Dec. 6, 1980; "Ham States Hood was 'Silent Partner,'" Dec. 7, 1980; "Ham Threatens TV Cameramen Outside Courthouse," Dec. 10, 1980; "Ham Admits Riches, Refutes Testimony On Pay to Blanton," Dec. 18, 1980.

II. Adequacy of Voir Dire

The most difficult issue concerns the adequacy of the voir dire on the subject of pretrial publicity.

A. Conduct of the Voir Dire

The trial court conducted the voir dire *en masse*. It seated a group of veniremen in the jury box and directed questions at that group, but instructed the rest of the veniremen in the courtroom to listen to and pay attention to the questions as the questions would apply equally to all those selected. During the course of the voir dire the trial court pointed out that the case had been the subject of considerable media attention. It commented that it was sure that all the veniremen had heard about the case, and that some of them may have formed a tentative opinion concerning the probable guilt or innocence of the defendants: The court then said to the veniremen:

> [T]he test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?

One juror was excused because she indicated she could not be impartial. As new veniremen entered the jury box to replace the ones who were excused for whatever reason, the trial court would ask them essentially the same question on pretrial publicity. It usually said it wanted to "particularly emphasize" the point. Out of ninety-two veniremen examined, a total of thirteen were excused because they indicated they had an opinion or prejudice they could not put aside. Of these thirteen, four linked their prejudice to pretrial publicity. Seven of these thirteen were excused when they said they had an opinion, without the court inquiring into the nature or strength

of the opinion or whether it could be put aside. Twenty-nine other veniremen were excused for cause for other reasons and the parties excused twenty-eight others with their peremptory challenges.

Defendants contend that the voir dire was inadequate to detect prejudice from the pretrial publicity and therefore violated their rights to due process and an impartial jury as guaranteed by the fifth and sixth amendments. *See Ristaino* v. *Ross*, 424 U.S. 589, 595 n.6 (1976). They also argue that the voir dire was inadequate to allow the intelligent use of their peremptory challenges to remove persons suspected of bias, and therefore their right to peremptory challenges under Fed. R. Crim. P. 24(b) was impaired.

B. Scope of Review.

We must first determine the proper scope of review. We have held "the court's determination about the questions to be put to the jury will not be disturbed without a clear showing of abuse of discretion." *United States* v. *Blount*, 479 F.2d 650, 651 (6th Cir. 1973). *See also United States* v. *Anderson*, 562 F.2d 394, 396 (6th Cir. 1977). ("Traditionally, a wide latitude of discretion is accorded the trial court in the selection of jurors.") The trial court is accorded this discretion because demeanor plays an important part in the determination of impartiality, and the adequacy of the voir dire is not easily subject to appellate review. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 188 (1981). A trial court's assessment of the force of a venireman's opinion or its finding of impartiality should be set aside only where the error is manifest. *Irvin* v. *Dowd*, 366 U.S. 717, 723-24 (1961); *Haney* v. *Rose*, 642 F.2d 1055, 1060 (6th Cir.), *cert. denied*, 452 U.S. 908 (1981).

On other hand, the federal rules limit that discretion by the "essential demands of fairness." *United States* v. *Johnson*, 584 F.2d 148, 155 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931)

Furthermore, in the case of a federal defendant, the court can presume prejudice in some instances, in contradistinction to a state habeas petitioner who must demonstrate prejudice. *Goins* v. *McKeen*, 605 F.2d 947, 951, 951 nn.7 & 8 (6th Cir. 1979); *see Marshall* v. *United States*, 360 U.S. 310, 312-13 (1959) (per curiam). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). When appropriate, as in highly publicized cases, it is "the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors." *Irvin* v. *Dowd*, 366 U.S. at 723. As noted in *Johnson*:

> [T]he 'essential function of voir dire is to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel.' A trial court commits reversible error if, by unduly restricting voir dire, it substantially impairs the peremptory challenge right. Where veniremen have been exposed to prejudicial publicity, the nature and degree of that exposure is certainly a matter of legitimate concern to a defense attorney in deciding on peremptory challenges.

584 F.2d at 155 (citations omitted).

C. Removal for Cause.

The first part of defendants' argument is that the voir dire was inadequate to determine which veniremen should have been excused for cause. The trial court undoubtedly applied the right test: Whether the veniremen could lay aside their impressions or opinions and render a verdict based on the evidence presented in court. *Irvin*, 366 U.S. at 723; *Johnson*, 584 F.2d at 154. The dispute in this case is whether the procedure was adequate to determine if the veniremen could lay aside any opinions they had formed about the case. In other words, to what extent could the court rely on the veniremen's

assurances of impartiality. Cases from the Supreme Court and federal circuit courts given different indications as to the answer to that question.

This court implied in Johnson that a court can accept a juror's assurances of impartiality when deciding whether to excuse a venireman for cause. In *Johnson*, the trial court had asked the veniremen whether they had heard or read about the case. Most were questioned individually and were asked when and where they heard about the case. The veniremen assured the court that their prior knowledge would not affect their ability to render an impartial verdict. After noting this information, the Sixth Circuit said that the veniremen could not have been challenged for cause because it was sufficient that the veniremen could lay aside preconceptions. 584 F.2d at 155, 155 n.16. On the other hand, we have cited the Supreme Court's pronouncement that "the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights." *United States* v. *Giacalone*, 588 F.2d 1158, 1163 (6th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979), *quoting Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). In *Giacalone* the court found the voir dire adequate because the voir dire did not indicate a hostility on the part of the jurors toward the defendant. *Id.* In *Goins* the court held that the jurors' assurances of impartiality were insufficient in the circumstances presented. 605 F.2d at 953 (6th Cir.). However, *Goins* can be distinguished on the basis that it dealt with publicity *during* a trial, which creates a greater threat of prejudice. *Id.* at 952; *see Sheppard* v. *Maxwell*, 384 U.S. 333, 354-55 (1966) (trial court's failure to take precautions against influence of pretrial publicity alone not a denial of due process except when considered in setting of trial publicity).

We cannot consider *Johnson* dispositive of the instant case because the court did not state that the assurances of the veniremen that they would be impartial was alone sufficient. In *Johnson*, unlike the instant case, there was individual questioning and there were inquiries into when and where the

veniremen were exposed to the publicity. Therefore we will examine the cases from the Supreme Court and other circuits.

The underlying concern with veniremen making their own assessment of their impartiality was expressed by Chief Justice Marshall when he faced the problem of pretrial publicity as the presiding judge at the trial of Aaron Burr in 1807. Chief Justice Marshall noted that a person will be excused for cause because of his relationship to the parties or because of personal prejudice, even if he promises to make his decision based solely on the evidence. The law will not trust such a person. *United States* v. *Burr*, 25 F. Cas. 49, 50 (No. 14,692g) (CC. Va. 1807). Chief Justice Marshall queried: "Is there less reason to suspect him who has prejudged the case, and has deliberately formed and delivered an opinion upon it? . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion." *Id.*

The problem of veniremen assessing their own impartiality is most acute when the circumstances command a presumption of partiality on the part of the venire. The Supreme Court has acknowledged that this presumption can arise when the publicity is highly sensational or inflammatory, as opposed to factual and straightforward. *Murphy* v. *Florida*, 421 U.S. 794, 802 (1975); *United States* v. *McNally*, 485 F.2d 398, 403 (8th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974). *Murphy* also said that the effect of prejudicial publicity is indicated by the number of veniremen who have an opinion as to the defendant's guilt. The court felt that twenty persons with opinions out of seventy-eight veniremen showed that the community was not poisoned with sentiment against the defendant. *Murphy*, 421 U.S. at 803.

What most courts consider the most important element in determining whether a presumption of prejudice should arise is the strength of the venireman's opinion which he is asked to set aside. Chief Justice Marshall stated:

> [L]ight impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him.
>
> *. . . The question must always depend on the strength and nature of the opinion which has been formed.*

25 F. Cas. at 51 (emphasis added).

In the leading pretrial publicity case the Supreme Court said there can be a presumption of partiality in some cases: "[T]he test is 'whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact . . . .'" *Irvin*, 366 U.S. at 723, *quoting Reynolds* v. *United States*, 98 U.S. 145, 156 (1878).

Courts differ on the extent to which a trial court can rely on a juror's assessment of his impartiality. As stated above, we implied in *Johnson* that a juror can assess his own impartiality. But *Giacalone* cited *Murphy*, where the Supreme Court stated in dicta: "[T]he juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" 421 US. at 800, *quoting Irvin*, 366 U.S. at 723. And in *Irvin* the Court said:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

366 U.S. at 728. On the other hand, the Supreme Court has said that the representation of a federal employee juror that he will be impartial in a federal case must be credited. *Dennis* v. *United States*, 339 U.S. 162, 170-71 (1950).

Most of the other circuits disapprove of relying on jurors' assurances of impartiality, although the strength of that disapproval varies. In three circuits, reliance on juror's assurances was disapproved under facts very similar to the instant case. The Fifth Circuit observed: "The juror is poorly placed to make a determination as to his own impartiality. Instead the trial court should make this determination." *United States* v. *Davis*, 583 F.2d 190, 197 (5th Cir. 1978). The court in *Davis* said that because publicity raised a significant possibility of prejudice, "[t]he court should have determined what in particular each juror had heard or read and how it affected his attitudes toward the trial, and should have determined for itself whether any juror's impartiality had been destroyed." *Id* at 196. The court said that separate examination of jurors is preferable, but not necessarily required. *Id.* at 196-97. Finally, the court recommended a procedure for trial courts to follow:

> An acceptable procedure is described in *U.S.* v. *Hyde*, 448 F.2d 815 (CA5, 1971), cert. denied, 404 U.S. 1058, . . . which dealt with publicity during the course of trial. Even though we held that the publicity was not prejudicial, we were critical of the trial court's asking the jury as a whole if anyone was exposed to publicity that would prevent him from impartially deciding the case. We said:
>
> > [T]his Circuit has determined that it is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they have been exposed to. Therefore, when there has been publicity that would possibly prejudice the defendants case if it reached the jurors, the court should first ask the jurors what information they have received. Then it should ask about the prejudicial effect and it should make an

> independent determination whether the juror's impartiality was destroyed.

Id. at 197. *See also United States* v. *Hawkins*, 658 F.2d 279, 282-85 (5th Cir. 1981). The Second and Ninth Circuits came to similar conclusions regarding a juror's ability to assess his own partiality. *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364, 371-73 (2nd Cir. in banc), *cert. denied*, 372 U.S. 978 (1963) (jurors' assurances that they could render an impartial verdict despite opinions formed by pre-trial publicity insufficient to show impartiality; change of venue constitutionally required); *Silverthorne* v. *United States*, 400 F.2d 627, 637-40 (9th Cir. 1968) (relies on *Bloeth, supra;* when every juror had some knowledge of case and almost thirty percent had opinions as to defendant's guilt, jurors' assurances of impartiality insufficient; jurors should have been questioned individually).

The Seventh Circuit has also found jurors' assurances inadequate, but in the case in which it did so the trial court did not emphasize the importance of putting aside the publicity before asking a general question on impartiality, as did the trial court in the instant case. *United States* v. *Dellinger*, 472 F.2d 340, 367-70 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

Two circuits have stated in strong language, but in dicta, that a juror's assurances are insufficient. In a case where the defendant waived an objection to the composition of the jury, the First Circuit stated: "[A] single question posed to the panel en bloc, with an absence of response, achieves little or nothing by way of identifying, weighing, or removing any prejudice from prior publicity." *Patriarca* v. *United States*, 402 F.2d 314, 318 (1st Cir. 1968), *cert. denied*, 393 U.S. 1022 (1969). The court added that the jurors should have been questioned individually to determine the kind and degree of the exposure to the case, the effect of the exposure, and the extent to which the state of mind was immutable or subject to change from evidence. *Id.*

The District of Columbia Circuit has acknowledged in dicta that under some circumstances relying on jurors' assurances of impartiality is insufficient, but the court has not yet found a case where the district court procedures were inadequate. *United States* v. *Caldwell*, 543 F.2d 1333, 1345-46 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976) (no objection by defendants to district court procedure; individual questioning of jurors who had heard about the case); *United States* v. *Liddy*, 509 F.2d 428, 436-37 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911 (1975) (individual questioning of veniremen who indicated they might have formed an opinion on the case); *United States* v. *Bryant*, 471 F.2d 1040, 1044 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1112 (1973) (individual questioning of veniremen who responded affirmatively to general questions).

Two other circuits have cited *Murphy* for the proposition that jurors' assurances of impartiality are not dispositive, but in both of those cases the procedures were found to be adequate. *United States* v. *Provenzano*, 620 F.2d 985, 995 (3rd Cir.), *cert. denied*, 440 U.S. 899 (1980) (publicity not prejudicial); *Brinlee* v. *Crisp*, 608 F.2d 839, 845-46 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980) (individual questions on pretrial publicity; minimal publicity; relatively few veniremen had opinions).

This survey of the cases from nearly every circuit suggests less deference to a juror's assessment of his impartiality than the sixth Circuit implied was appropriate in *Johnson*, 584 F.2d 148. It appears that the Second, Fifth, Ninth and Eleventh[9] Circuits would reverse in a case like the one at bar. Dicta from the First and District of Columbia Circuits indicate they would reverse. The Third, Seventh, and Tenth Circuits expressed suspicion of jurors' assurances of impartiality, but the facts in the cases from those circuits differ too much from the instant case to determine how those courts would ultimately

[9] The Eleventh Circuit follows the law of the old Fifth Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (1981).

rule. No court has approved of questioning as limited as the questioning in this case where there was substantial pretrial publicity. The questioning here can be considered limited only as it relates to the effect of the pervasive publicity, and the extent and depth of the individual talesmen's exposure to the massive publicity; otherwise the voir dire was admirably conducted by trial court.

In another case from this circuit, the court discussed a juror's assessment of his impartiality in the context of his ability to accept the proposition of law that a defendant is presumed innocent. The trial court refused to ask the veniremen whether they could accept that proposition and the Sixth Circuit reversed for this refusal. *Blount*, 479 F.2d at 651. However, the concurring judge in *Blount* felt that the trial court did enough by asking the jurors whether they would accept the charge of the court on the law as it applied to the evidence. *Id.* at 652.

The trial court's questioning was less extensive here than in any of the cases from other circuits which found the questioning adequate. No inquiry was made of the veniremen about the extent of their exposure to the case, although the amount of coverage may have made the trial court's assumption that everyone had heard about the case correct. Nevertheless, the answers to this question would have shed light on the credibility of other answers.

More important, the trial court did not ask the veniremen whether any had formed an opinion about the case. The number of persons answering affirmatively could have indicated the extent to which the minds of persons in the community had been "poisoned" by the publicity. *See Murphy*, 421 U.S. at 803. If only a few persons said they had opinions, the trial court may have excused all of the veniremen so indicating. Depending on the number of persons responding affirmatively, further questioning may have been necessary to determine whether the opinions were light impressions or strong and deep impressions. *See United States* v. *Burr*, 25 F. Cas. at 51.

The voir dire here was not sufficient to determine the percentage of veniremen who had a preconceived opinion, *Murphy*, 421 U.S. at 803, and it was not sufficient to determine the strength of the opinions. The publicity was not such that it was inherently prejudicial. It was massive and pervasive, but mostly factual and some of it was as critical of defendants' chief accuser as it was of defendants. Therefore, questions about who held opinions would not necessarily have been futile; there might have been only a small number of veniremen holding opinions.

Admittedly, questioning as to the strength of opinions may have had to be done individually because of the possibility of contaminating the other veniremen. However, other circuits have acknowledged that individual questioning will at times be necessary. *See, e.g., Patriarca*, 402 F.2d at 318 (1st Cir.); *Silverthorne*, 400 F.2d at 639 (9th Cir.). *See also*, ABA Standards Relating to Fair Trial and Free Press, § 8-3.5 and commentary (Approved Draft 1978). On the other hand, trial courts may be under constitutional restrictions not to shut out the press and public from voir dire proceedings, *In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676, 679-80 (8th Cir. 1980) (Gibson, J., concurring), raising questions about the propriety of calling a veniremen to the bench for individual questioning.

While the issue of voir dire as it relates to obtaining an impartial and unbiased jury is often a close one, entailing the balancing of competing considerations, we here are driven to the conclusion that there was insufficient questioning of the veniremen to be able to conclude that they were impartial notwithstanding the massive pretrial publicity; and thus the defendants' fifth amendment right to due process and sixth amendment right to an impartial jury were violated.

D. Peremptory Challenges.

Another and further question arises in connection with the peremptory challenges. Even assuming that the voir dire met the constitutional standards, there remains the question of whether the voir dire was so inadequate that it impaired the right to exercise peremptory challenges under Fed. R. Crim. P. 24(b).

The Supreme Court has recognized the importance of peremptory challenges: "[P]eremptory challenge is a necessary part of trial by jury. . . . [T]he challenge is 'one of the most important of the rights secured to the accused . . . .'" *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), *quoting Pointer* v. *United States*, 151 U.S. 396, 408 (1894). Voir Dire is essential in permitting the intelligent use of peremptory challenges, and the impairment of the peremptory challenge right is reversible error without a showing of prejudice. *Id.* at 219; *Johnson*, 584 F.2d at 155 (6th Cir.) (a trial court commits reversible error if by unduly restricting voir dire, it substantially impairs the peremptory challenge right). On the other hand, the purpose of the peremptory challenge is to obtain an impartial jury, not one sympathetic to a party's position. C. Wright, Federal Practice and Procedure § 381, at 332-33 (1982).

This court has stated that a party has a right to have a question asked during voir dire if an anticipated response would afford the basis for a challenge for cause. *Blount*, 479 F.2d at 651. Where veniremen have been exposed to prejudicial publicity, the nature and degree of the exposure is certainly a matter of legitimate concern to a defense attorney in deciding upon peremptory challenges. *Johnson*, 584 F.2d at 155. In the interest of expediency, "trial courts can ordinarily restrict voir dire on the subject of pre-trial publicity to the questioning of veniremen on the sources and intensity of exposure and the juror's ability to disregard the publicity in reaching a verdict." *Id.* The court in *Johnson* found the voir dire adequate because

the defense had failed to establish a foundation for inquiry into recollection of prejudicial matter. *Id.* at 156.

According to *Johnson*, the voir dire can be limited to questions on (1) sources of exposure, (2) intensity of exposure, and (3) a venireman's ability to disregard the publicity. *Id.* at 155. The trial court only asked questions in the third area. And, according to *Irvin*, this is the ultimate issue. 366 U.S. at 723. Viewed thusly, perhaps the first two questions are irrelevant once the third one is answered However, we find this reasoning deficient, in ignoring two factors: (1) answers to the first two questions could help a trial court assess the credibility of a venireman's assurance that he could disregard the publicity, and (2) such information is certainly necessary to make an intelligent and meaningful use of the peremptory challenges.

The trial court's questioning did not help the defense counsel with peremptory challenges because an affirmative response to the question it asked would require the venireman be excused for cause. Information on whether a venireman had an opinion he felt he could put aside or the extent and nature of the publicity he encountered could have assisted defense counsel. In this case, we think the failure to ask such questions is an "impairment" requiring reversal. The fact that the court excused veniremen who said they had an opinion did not cure the deficiency in the questioning. That information was volunteered; it did not come in response to the court's questions. Therefore veniremen who held opinions might have gone undetected.

The implication in *Johnson* is that the failure to ask questions on the sources and intensity of exposure to pretrial publicity is an impairment of the peremptory challenge right. Likewise, the Third Circuit has stated that the parties have a right to some surface information which might furnish a basis for an intelligent exercise of peremptory challenges based on a lack of impartiality. *United States* v. *Segal*, 534 F.2d 578, 581 (3rd Cir. 1976); *accord United States* v. *Baldwin*, 607 F.2d 1295,

1297 (9th Cir. 1979). The Seventh Circuit also requires that the questions be more than conclusory; they must allow for intelligent exercise of peremptory challenges. *Dellinger*, 472 F.2d at 367-68.

On the other hand, an "impairment" of the peremptory challenge right could be seen as limited to situations where the number of challenges is effectively reduced when a trial court erroneously fails to excuse veniremen for cause. *See* C. Wright, Federal Practice and Procedure § 384, at 371, 371 n.5 (1982). However, we agree with the implication in *Johnson* that the voir dire should provide some surface information so the parties can use their peremptory challenges in an intelligent or purposeful manner.

In the instant case, where their was substantial, even massive pretrial publicity, the voir dire should have been extensive enough to allow defendants to learn which veniremen were most exposed to publicity, from what sources that exposure came, and who held opinions. That information would have helped defendants detect suspected biases and use their peremptory challenges accordingly, helping to insure an impartial jury. The defendants had no information which would cause them to suspect biases which either were not strong enough for disqualification for cause or were not evident enough for the court to believe disqualification was in order. The lack of such information was an impairment of the peremptory challenge right, and would of itself require reversal.

We are not unmindful of the trial court's finding that the "jury selected is as fair and impartial a jury as could be obtained" and that a trial judge must be accorded considerable latitude and allowed a range of flexibility in impaneling a petit jury. Also we note that an appellate court will not interfere with the jury selection process absent an abuse of discretion. *Blount*, 479 F.2d at 651; *United States* v. *Owens*, 415 F.2d 1308, 1315 (6th Cir. 1969), *cert. denied*, 397 U.S. 997 (1970); *Silverthorne*, 400 F.2d at 638. Although the trial court's finding might be correct, there is no way on this record to probe that

finding since the record is silent on the extent of the veniremen's exposure to the pretrial publicity and the depth and extent of their personal reactions to the massive publicity. We conclude as a matter of fairness that the court should have probed into the effect of the publicity upon the prospective jurors, both for challenges for cause and for the exercise of peremptory challenges.

III. Prosecutorial Misconduct

Our conclusion on the voir dire issue requires reversal and a remand to the district court for a possible retrial. However, one of the issues raised by defendants could require outright dismissal. Defendants argue that there was prosecutorial misconduct requiring dismissal of the indictment. They argue alternatively that Jack Ham's testimony should have been suppressed because of the prosecutorial misconduct. We hold that the prosecutors' conduct does not warrant dismissal of the indictment. For purposes of guidance on remand, we point out that we find no error in the trial court's failure to suppress Ham's testimony.

Defendants argue that there were several types of prosecutorial misconduct. The first alleged misconduct is the government's procuring of an agreement from the ABC not to revoke Ham's liquor license on the basis of truthful statements he gave at judicial proceedings.[10] Ham wanted this agreement be-

[10] The executive director of the ABC wrote a letter to an Assistant United States Attorney on April 23, 1980, saying:

> It would be my recommendation in any future [ABC] proceedings that no punitive action by the [ABC] be taken against this individual [Jack Ham] or any license he might hold, including revocation of ABC retail license, because of his truthful testimony before the Grand Jury or future judicial proceedings in either the Federal or State Court's systems.

This letter was written without the knowledge of the ABC commissioners. The United States Attorney's office later contacted the three ABC commissioners, and they all stated orally that they did not intend to revoke Ham's license based on the manner in which it was obtained.

cause fraudulent acquisition of a license is grounds for revocation of the license.[11] The government convinced ABC officials that the best interests of all concerned would be served if Ham did not have to fear losing his license because of his testimony. Defendants argue that this agreement was improper in two ways. The first is that the agreement constituted mail fraud because under the agreement ABC officials were forgoing a statutory duty to investigate fraudulently obtained licenses.[12] The second is that the agreement violated 18 U.S.C. § 201(h) (1976), which prohibits the giving of something of value in exchange for testimony.[13]

We find defendants' claim to be without merit. First, the government committed no fraud by encouraging the ABC not to revoke Ham's liquor license. The government wanted the

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[11] Tenn. Code Ann. § 57-3-104(c) (1980) provides:

> [The ABC] shall have and exercise the following functions, duties and powers, to wit:
>
> . . . .
>
> (2) To refuse to issue a license or permit if, upon investigation, it finds that the applicant for a license or permit has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning the operation of the business or employment, or if the interest of the applicant in the operation of the business or employment is not truly stated in the application, or in case of any fraud or false swearing by the applicant touching any matter relating to the operation of the business or employment. *If a license or permit has been issued, the commission shall issue a citation to the licensee or permittee to show cause why his license or permit should not be suspended or revoked.*

(Emphasis added).

[12] See note 11, *supra*.

[13] 18 U.S.C. § 201(h) (1976) provides:

> Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . .
>
> . . .
>
> Shall be fined not more than $10,000 or imprisoned for for not more than two years, or both.

ABC to forgo revocation, and the ABC agreed to do so. State law does not require revocation,[14] so the decision regarding Ham's license did not interfere with any statutory duty on the ABC's part. The only duty which apparently was not adhered to was that of requiring the licensee to show cause why his license should not be revoked. However, the government did not ask the ABC to forgo this procedure. Perhaps if a "show cause" hearing had been held, the ABC would have allowed Ham to keep his license because of its prior commitment. Forgoing what could have been a futile hearing was not part of the promise the ABC made to the government. The government did not do anything to defraud the state of Tennessee of the fair and honest services of the ABC.

Likewise, we find no violation of § 201(h). The purported "thing of value" – a liquor license — was not offered by the government. The ABC director believed that the public interest would be served by exposure of possible corruption in the ABC during the Blanton administration. Admittedly, the government encouraged the ABC to adopt this viewpoint. But there was no evidence that it had anything at its disposal other than the power of persuasion; there is no evidence of any coercive power on the government's part. Therefore, the offer cannot be said to have come from the government.

Furthermore, even if the ABC were merely the agent of the government, the government did not "give" a thing of value. There was merely the preservation of the status quo. Regardless of whether or not Ham cooperated with authorities, the ABC could have allowed Ham to keep his license. We do not characterize the ABC's failure to exercise a discretionary power the "giving" of a thing of value. Therefore, the trial court properly declined to exercise its supervisory powers to dismiss the indictment or suppress Ham's testimony.

Defendants also allege prosecutorial misconduct in the government's not telling the grond jury about the ABC agree-

[14] See note 11, *supra*.

ment. Ham appeared before the grand jury twice. The first time no mention was made of the ABC agreement. The second time the grand jury was told that the United States Attorney's office would inform the ABC of Ham's cooperation, but it was told that the ABC had already indicated a willingness to forgo action on Ham's license.

We also find this claim to be without merit. Although the government could have given a more complete description of its agreement with Ham, its failure to do so was not the type of extreme conduct required for dismissal of the indictment. *See United States* v. *Nembhard*, 676, F.2d 193, 199 (6th Cir. 1982). Furthermore, the government is under no duty to provide evidence which would be favorable to the defendant, *United States* v. *Ruyle*, 524 F.2d 1133, 1135-36 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), such as by undermining the credibility of government witnesses. *United States* v. *Trass*, 644 F.2d 791, 796-97 (9th Cir. 1981). Therefore, the trial court neither had to dismiss the indictment nor suppress Ham's testimony; the courts are and should be reluctant to interfere in the executive functions of the prosecutor in making presentations to a grand jury.

Blanton alleges other prosecutorial misconduct in not telling the grand jury that Ham admitted lying about a $5,000 payoff to Blanton as well as other matters, and in not trying to resolve a conflict in testimony between Jack Ham and another government witness, Jack Ham's nephew, Bert. We again find no misconduct.

Blanton is wrong in asserting that the grand jury was not told about Ham's lying as to the $5,000 payment. The grand jury was fully informed that Ham believed he was mistaken about making the $5,000 payment to Blanton. This payment was not included in the indictment. As to other purported lies, Ham's statement that he told government representatives that he was lying is contradicted by the government representatives. The evidence of prosecutorial misconduct in this regard is insuf-

ficient to warrant dismissal of the indictment or suppression of the evidence.

The testimony of Bert Ham contradicted Jack's in that Bert said Jack skimmed profits and Jack denied the allegations. Blanton argues that one of the government witnesses, either Jack or Bert, had to be lying, and the government therefore violated the due process clause by presenting a witness it knew was lying. Blanton relies on *United States* v. *Basurto*, 497 F.2d 781, 785 (9th Cir. 1974), for the proposition that a party need not stand trial on an indictment based on material perjured testimony. But in this case the perjury was not material; it was collateral to the issue of Blanton's guilt. Also, the government could not in this proceeding adjudicate who was truthful; it properly left the matter to the jury to resolve. Bert's testimony undercut the credibility of the government's chief witness, Ham. If Bert was the perjuror, the testimony only unfairly hurt the government's case. If Jack Ham did skim profits, the government weakened his credibility by presenting Bert's testimony. We fail to see how the conflict harmed Blanton; indeed, it may have helped him. Therefore, there was no prosecutorial misconduct warranting dismissal of the indictment or suppression of Ham's testimony.[15]

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[15] Defendants alleged another instance of prosecutorial misconduct in a separate appeal from an order of the court below. That appeal stemmed from the revocation of Ham's immunity during the course of the trial. The government revoked Ham's immunity after concluding that Ham lied when he denied skimming profits. On May 16, 1981, almost one month into the trial, the government revoked Ham's immunity and Ham was indicted two days later. After the trial, Ham successfully sought to have the indictment dismissed on the basis that the immunity revocation was improper. Evidence adduced at a hearing on Ham's motion to dismiss indicated that the indictment might have been a ploy by the government to show the jury that Ham was being forced to obey his immunity agreement. Defendants felt this revelation was new evidence of prosecutorial misconduct and sought a new trial. The trial court lacked jurisdiction to grant a new trial because the instant appeal had already been filed, and the court refused to certify to this court that it was inclined to grant the motion. The trial court made that ruling because defense counsel insisted that the jury be told about the indictment and the indictment would not help the government's case. Defendants appealed the trial court's refusal to certify, which was consolidated with the instant appeal for purposes of oral argument. We disposed

IV. Other Issues.

Our conclusions on the voir dire and prosecutorial misconduct issues dispose of the case. However, some of the other issues raised on appeal by defendants could reappear at a retrial, so we will address those issues.

A. Change of Venue.

Only Blanton and Allen moved, pursuant to Fed. R. Crim. P. 21(a), for a change of venue, and only Blanton appeals on this issue. Blanton specifically moved for a change of venue from the Middle District of Tennessee to the Eastern District of Tennessee. The trial court denied both defendants' motions.

A grant or denial of a change of venue motion is a matter within the discretion of the trial judge. *United States* v. *Etheridge*, 424 F.2d 951, 967 (6th Cir. 1970), *cert denied*, 400 U.S. 993, 1000 (1971), *cert. dismissed sub. nom. Bostic* v. *United States*, 402 U.S. 547 (1971). A more thorough voir dire on the publicity issue would have better shown whether there was a need for a change of venue. The court had the power to change the venue to a location outside Tennessee even though Blanton specifically requested the Eastern District of Tennessee. Fed. R. Crim. P. 21(a). If, on remand and after attempting voir dire, the district court should conclude that a change of venue is still necessary in order to accord the defendants a fair trial, it is free to order a change of venue at that time. *Johnson*, 584 F.2d at 154 (6th Cir. 1978). However, the record before us does not show that a more inquisitive voir dire would necessarily be insufficient to protect defendants' right to an impartial jury.

B. Severance of Hood.

Hood appeals the trial court's denial of his motion to sever

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of the appeal from the refusal to certify on procedural grounds, finding the trial court's order unappealable. *United States* v. *Blanton*, No. 82-5091 (M.D. Tenn. Jan. 10, 1983).

pursuant to Fed. R. Crim. P. 14. Hood argues that the voir dire was insufficient for the trial court to determine whether juror prejudice toward Blanton would prejudice Hood.

The decision to grant or deeny a severance is a matter of discretion for the trial court. *Etheridge*, 424 F.2d at 967. A more thorough voir dire on the publicity issue would reveal whether there was any prejudice against Blanton that the jurors could not put aside and it might reveal whether such prejudice would affect Hood. However, the nature of the case does not appear to be such that negative attitudes toward Blanton would necessarily affect Hood. Indeed, Hood was acquitted on three counts on which Blanton was found guilty. Even with the voir dire as conducted, there was not enough evidence from other sources to show prejudice toward Hood which would require severance.

C. Jury Instructions.

Defendants Allen and Hood make two complaints about the jury instructions. The first is that the court erred in charging the jury that the government did not violate the law prohibiting the bribing of witnesses (18 U.S.C. § 201(h)) by obtaining the commitment from the ABC regarding Jack Ham's liquor license. As we stated in Section III, this was a correct statement of the law. Therefore, we find no error in this instruction.

Defendants also complain of the instruction that the alleged scheme to violate Tennessee liquor laws (those prohibiting office holders and public employees from having an interest in liquor stores and prohibiting concealed interests) would be a scheme to defraud.[16] Defendants argue that the jury

[16] The trial court described the state laws which were allegedly violated and then said: "The defendants deny that they or either of them entered into a scheme to violate such liquor laws. We charge you that a scheme or plan to violate these laws in this manner would be a scheme to defraud."

should have been permitted to decide for itself whether defendants' acts constituted a scheme to defraud because this was a question of fact for the jury.

We believe the instruction was proper. It did not remove from the jury the determination of an essential matter. The district court merely defined a scheme to defraud, and it did so by saying that the scheme alleged to have been conducted would be a scheme to defraud under the mail fraud statute. Other circuits have approved instructions that define a scheme to defraud in the context of the facts of the case. *United States* v. *Bush*, 522 F.2d 641, 651, 651 n.10 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *see United States* v. *Rowe*, 56 F.2d 747, 749 (2nd Cir.) (Hand, J.), *cert. denied*, 286 U.S. 554 (1932).

D. Exclusion of Testimony.

Finally, Blanton argues the trial court made incorrect evidentiary rulings in limiting the testimony of some of his witnesses. Blanton called fifteen witnesses who were prepared to testify that Blanton was free from corruption; most of these witnesses were members of his cabinet. Blanton wanted to call these witnesses to rebut the allegation in the indictment that Blanton was out to defraud the citizens of Tennessee of the honest services of their governor. The court allowed one person to so testify, but ruled that the testimony of the other witnesses would be limited to showing how little of Blanton's time was devoted to ABC matters and how little time he would have had to devote to these matters. The court felt the questioning desired by Blanton would allow the government to bring up corruption in areas other than the ABC, and this could prejudice the other defendants. The court also felt that the questions would not be relevant because the court intended to charge the jury to consider only corruption in the ABC, and it did so.

The trial court weighed the probative value of the evidence

against its danger of unfair prejudice pursuant to Fed. R. Evid. 403 and concluded that the testimony should be limited to certain areas. A trial court's evidentiary ruling will be disturbed on appeal only when there is a grave abuse of discretion. *United States* v. *Jenkins*, 525 F.2d 819, 824 (6th Cir. 1975). The court's weighing was reasonable and clearly not an abuse of discretion.

V. Conclusion

It is fundamental in our system of justice that a defendant has the right to a trial by an impartial jury. A prominent defendant has no greater right than any other citizen. But in a highly publicized case steps must be taken that would not be necessary in the ordinary case to ensure that the defendant stands trial before a group of impartial jurors. The right to an impartial jury is so important that we require that the record show that adequate steps were taken to make sure the jurors were unbiased. We reluctantly conclude that the trial court did not ask sufficiently adequate questions to be able to find that the jurors could put aside opinions they might have formed as a result of the massive publicity. The questioning was insufficient to detect biases in this case so that counsel could make a reasonable and intelligent use of their peremptory challenges. The extent and depth of the venire exposure to the massive and lengthy publicity was not probed, resulting in an impairment of defendants' rights to a fair and impartial jury as shown on the record.

The convictions are reversed and the case remanded to the district court for further proceedings.

APPENDIX C

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

JUDGMENT AND OPINION IN

No. 81-5643
No. 81-5644
No. 81-5645

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LEONARD RAY BLANTON, (81-5644) CLYDE EDWARD HOOD, JR., (81-5645) JAMES M. ALLEN, (81-5643) *Defendants-Appellants.*	APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed September 28, 1983

EN BANC

Before: EDWARDS, Chief Circuit Judge, LIVELY, ENGEL, KEITH, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY and WELLFORD, Circuit Judges.*

EDWARDS, Chief Circuit Judge, delivered the opinion of the court in which LIVELY, CONTIE, KRUPANSKY and WELLFORD, Circuit Judges joined. KENNEDY, Circuit Judge, concurred in the majority opinion and filed a special concurring opinion (p. 34). ENGEL, Circuit Judge, filed a dissenting opinion in which MARTIN and JONES, Circuit Judges concurred (pp.

* Honorable Gilbert S. Merritt disqualified himself from the en banc hearing of this case.

35-60). KEITH, Circuit Judge, concurred with Judge Engel's dissent and filed a separate dissenting opinion (pp. 61-64).

EDWARDS, Chief Circuit Judge. In this case this circuit is required to review en banc the claims of the former Governor of Tennessee and two associates that they have been deprived of a fair jury trial. Their principal claim is that inadequate protective measures were employed by the trial judge in the jury selection process to guard them against the prejudicial effect of massive adverse pretrial media publicity.

We believe that we can and should accept much of the able work accomplished by the panel[1] which first heard this case. We shall therefore deal afresh and in detail only with the principal claim stated above upon which the original panel agreed with appellants and ordered a new trial.

This claim we now subdivide into three questions and provide our answers:

1) Did the District Judge employ the best procedure possible in his voir dire examination of the prospective jurors in this case?

Probably not.

2) Did the trial judge abuse the broad discretion vested in him by the rulings of the Supreme Court of the United States in his impaneling of this jury?

No.

3) Did the voir dire examination of jurors suffice to produce an impartial jury and fundamentally fair trial?

Yes.

We accept the original panel's statement of facts:

The three defendants are Blanton, who served as gov-

[1] The original panel consisted of Circuit Judges Albert J. Engel and Damon J. Keith of this Court, and Chief Judge Emeritus Floyd Gibson (now Senior Judge of the Eighth Circuit) who wrote the panel opinion.

ernor of Tennessee from January, 1975 to January, 1979, James M. Allen, who was a special consultant to the governor for the first six months of the Blanton administration and had served as Blanton's campaign manager, and Clyde Edward Hood, who was a special assistant to the governor from January, 1975 to November, 1977. Defendants were charged on October 29, 1980, in a twelve-count indictment with eight counts of mail fraud, (18 U.S.C. §§ 2, 1341 (1976)), one count of violating the Hobbs Act (18 U.S.C. §§ 2, 1951 (1976)), and one count of conspiracy (18 U.S.C. § 371 (1976)). Blanton alone was charged with two counts of tax evasion and filing a false tax return. (26 U.S.C. §§ 7201, 7206(1) (1976)). On March 12, 1981, a superseding indictment was issued adding one mail fraud count. The tax counts against Blanton were severed. The essence of the charges was that defendants used their positions to see that friends of Blanton would receive retail liquor licenses from the Tennessee Alcoholic Beverage Commission (ABC) and that one person paid Blanton for receipt of his license.

The most important evidence against defendants was the videotaped deposition of Jack Ham. Ham was an immunized witness who was the recipient of a liquor license during Blanton's tenure and who allegedly agreed to give Blanton a cut of the profits in violation of state law. Ham had contributed $1,000 to the Blanton campaign.

Blanton's role in the scheme allegedly was that he directed that liquor licenses be awarded to political friends or persons like Ham who offered a cut of the profits. He allegedly accomplished this by appointing two of the three commissioners of the ABC, including the chairman, S. J. King, and the commission was therefore able to appoint Blanton allies as director and assistant director of the ABC. Blanton allegedly agreed to an illegal twenty percent cut of the profits of Ham's liquor store, with the payment coming in the form of Ham's purchase of

allegedly worthless oil stock from Blanton for $23,000.[1] (This method of payment resulted in tax savings to Ham.) Blanton also allegedly approved a transfer of Ham's liquor license to a more lucrative location.

Allen was alleged to have been in charge of determining the awarding of liquor licenses even though he had no position at the ABC. He allegedly helped set up an illegal ownership of a liquor store involving the ABC chairman and he attempted to acquire a concealed interest in a liquor store under the guise of a lucrative consulting contract (only one payment was made under the contract). He allegedly was responsible for hiring a new ABC assistant director to help control the ABC even though Allen was not even a state employee at the time, and he instructed the assistant director to recommend the transfer of Ham's license to a better location and recommended against the transfer of other persons' licenses to that area.

Hood allegedly planned to acquire an interest in two liquor stores in contravention of various state laws and he received a share of the profits of some of the newly licensed liquor stores. He allegedly told the director of the ABC who Blanton's friends were so that the director would recommend to the ABC that those persons receive licenses. He allegedly helped accomplish the transfer of Ham's license by talking to ABC chairman King and by suggesting a particular person as the assistant director who would persuade the other Blanton appointee on the commission. Finally, he allegedly suggested that Ham pay Blanton's share of the profits by buying the worthless oil stock (although he later advised against the purchase).

The scheme violated Tennessee's laws against an ABC

[1] A total of $38,000 was allegedly paid for the oil stock. In addition to the $23,000 for Blanton's cut of the liquor store profits, Ham and his nephew, Bert Ham, paid another $15,000 as a finder's fee for Blanton's help in getting a loan on a housing project they were building.

commissioner having an interest in a liquor store,[2] public officials having an interest in a liquor store,[3] undisclosed interest in liquor stores,[4] and bribing of public officials.[5] The federal charge was that the acts (1) constituted a conspiracy to defraud the United States by use of the mails in furtherance of defendants' scheme to violate Tennessee law (18 U.S.C. § 371), (2) when coupled with mailings, constituted mail fraud by defrauding the citizens of Tennessee of the honest services of their government officials (18 U.S.C §§ 2, 1341), and (3) violated

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[2] Tenn. Code Ann. § 57-1-108(a) (1980) provides: "[N]o person shall be employed in any capacity by the commission, if such person shall have any interest . . . in any . . . retail dealer licensed as such in the state of Tennessee."

[3] Tenn. Code Ann. § 57-3-210(b)(1) (1980) provides:

> No wholesaler's or retailer's license shall be issued to a person who is a holder of a public office . . . . It shall be unlawful for any such person to have any interest in such wholesale or retail business, directly or indirectly, either proprietary or by means of any loan, mortgage, or lien, or to participate in the profits of any such business[.]

[4] Tenn. Code Ann. § 57-3-210(f) (1980) provides: "It shall be unlawful for any person to have ownership in, or participate, either directly or indirectly, in the profits of any wholesale or retail business licensed under this chapter, unless his interest in said business and the nature, extent and character thereof shall appear on the application . . . ."

[5] Tenn. Code Ann. § 39-081 (1975) provides:

> Any person who corruptly offers, promises, or gives to any executive . . . officer . . . any gifts, gratuity, or thing of value, with intent to influence his act, vote, opinion, decision, or judgment, on any matter, cause, or proceeding which may be then pending, or which may be by law brought before him in his official capacity, shall, on conviction, be imprisoned in the penitentiary . . . .

Tenn. Code Ann. § 39-802 (1975) provides:

> Any executive . . . officer who corruptly accepts, or agrees to accept, any gift or gratuity, or thing of value . . . under an agreement or with an understanding that his vote, opinion, or judgment is to be given in any particular manner, or upon any particular side of any question or proceeding which is, or may by law be brought, before him in his official capacity, or that, in such capacity, he is to make any particular appointment, shall, on conviction, be punished by imprisonment in the penitentiary . . . .

the Hobbs Act (interference with commerce by threats or violence) (18 U.S.C. §§ 2, 1951).

The testimony of the chief prosecution witness, Jack Ham, was videotaped pursuant to Fed. R. Crim. P. 15(a) because of Ham's poor health. The videotape was edited and played for the jury at the trial. The government obtained Ham's testimony offering him immunity from federal prosecution and civil tax liability, and the state agreed not to prosecute Ham. The ABC agreed that it would not revoke Ham's lucrative liquor license on the basis of truthful statements he made in judicial proceedings.

The trial was preceded by massive publicity about the case in Nashville, Tennessee, and throughout the state, as one would expect in the trial of a former governor. The record contains over 240 articles from Nashville newspapers adverse to defendants. There are approximately 160 articles which appeared in the six months preceding the trial about the instant prosecution, the prosecution of Blanton's brother, and the prosecution of former Blanton aides.[6] There are more than seventy-five

[6] Most of the very negative publicity came shortly after the indictment: "Blanton Faces 12 Counts." Oct. 30, 1980; "Enlist Blanton's Aid in Obtaining Licenses for Future Profits," Oct. 30, 1980; "Allen's Influence Had Wide Impact," Oct. 30, 1980; "Hood's Success, Woes Laid To Misdirected Talent," Oct. 30, 1980; "Blanton-Era Investigations Span 5 years," Oct. 30, 1980; "Blanton Faces Two Federal Court Trials," Nov. 21, 1980. Not all of the articles were negative: "Blanton's Defense Said Good," Nov. 6, 1980; "Friends Eye Legal Fund for Blanton," Nov. 1, 1980. Two months before trial there were articles on the criminal activities of Blanton aides: "Former ABC Head Enters Guilty Plea," Feb. 23, 1981; "Ex-Blanton Aide Enters Guilty Plea," Feb. 25, 1981; "ABC Probing Blanton Associate's License After Kickback Admission," Feb. 26, 1981. The month before the trial began the superseding indictment was issued, prompting more publicity: "Blanton, 2 Aides Indicted Again," Mar. 12, 1981. As late as four days before trial articles linked Blanton to improper pardons of state inmates: "Tapes Link Blanton to 30 Commutations," Apr. 16, 1981; "Taylor on Tape Links Ray Blanton To Clemency Deals," Apr. 15, 1981. Blanton's brother Gene was also in the news shortly before trial because of alleged improprieties: "Gene Blanton To Be Accused of Not Telling $72,000 Income," Mar. 24, 1981; "Gene Blanton

other articles which appeared while Blanton was governor concerning his administration.[7] There are another twenty-two articles on the deposition of Jack Ham, the last of which appeared four months before the beginning of the trial.[8] A large part of the original indictment was published verbatim in the Nashville newspapers. There was also an offer of proof concerning the testimony of news directors of three Nashville television stations about the pretrial publicity. There can be no doubt that there was an extraordinary amount of pretrial publicity concerning this case and other cases involving officials of the Blanton administration and some of Blanton's relatives.

Jury selection began on April 20, 1981. Testimony in the case began on April 22, 1981, and was concluded on May 29, 1981. Closing arguments and jury instructions were completed on June 2, 1981. The court dismissed three mail fraud counts and the Hobbs Act count as to Allen. The jury deliberated until June 9, 1981, and found Blanton guilty on all eleven counts. It found Allen guilty on all the counts the court had not dismissed (six mail fraud counts and one conspiracy count). It found Hood guilty on six mail fraud counts and the conspiracy count, but it found him not guilty on the other three mail fraud counts and the Hobbs Act count. Blanton was sentenced to three years and fined $11,000. Allen was sentenced to two years and fined $14,000. Hood was sentenced to eighteen months and fined $14,000.

Bought Autos With Business Funds, Says Frensley," Apr. 16, 1981. Most of the other articles dealt with procedural aspects of pretrial proceedings.

[7] Most of these articles dealt with patronage in the Blanton administration and the pardon of prisoners, including the pardon or commuting of sentences of 52 prisoners, 23 of them murderers.

[8] Some of the articles were entitled: "Ham Details Meetings With Blanton," Dec. 6, 1980; "Ham States Hood was 'Silent Partner,'" Dec. 7, 1980; "Ham Threatens TV Cameramen Outside Courthouse," Dec. 10, 1980; "Ham Admits Riches, Refutes Testimony On Pay to Blanton," Dec. 18, 1980.

QUESTION 1.

Did the trial judge employ the best procedure possible in his voir dire examination of the prospective jurors in this case?

Probably not.

The only way this question can fairly be answered is to read the entire content of the juror voir dire, which fills 289 pages of this trial record. We believe that every judge on the en banc court has performed this task – although obviously differences of interpretation remain. We cannot reprint the entire voir dire, but we can reprint the panel's statement of facts concerning it:

> The trial court conducted the voir dire *en masse*. It seated a group of veniremen in the jury box and directed questions at that group, but instructed the rest of the veniremen in the courtroom to listen to and pay attention to the questions as the questions would apply equally to all those selected. During the course of the voir dire the trial court pointed out that the case had been the subject of considerable media attention. It commented that it was sure that all the veniremen had heard about the case, and that some of them may have formed a tentative opinion concerning the probable guilt or innocence of the defendants. The court then said to the veniremen:
>
> > [T]he test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?
>
> One juror was excused because she indicated she could not be impartial. As new veniremen entered the jury box to replace the ones who were excused for whatever reason, the trial court would ask them essentially the same

> question on pretrial publicity. It usually said it wanted to "particularly emphasize" the point. Out of ninety-two veniremen examined, a total of thirteen were excused because they indicated they had an opinion or prejudice they could not put aside. Of these thirteen, four linked their prejudice to pretrial publicity. Seven of these thirteen were excused when they said they had an opinion, without the court inquiring into the nature or strength of the opinion or whether it could be put aside. Twenty-nine other veniremen were excused for cause for other reasons and the parties excused twenty-eight others with their peremptory challenges.

If we total the disqualifications which resulted from measures taken by the trial judge to secure an impartial jury, we find that 70 out of a total of 92 veniremen were excused.

Accepting as we do appellant's contentions that they had been the subject of massive publicity – much of it negative – we believe the initial trial judge in this case had a more serious problem than my colleagues in dissent tend to recognize, that he recognized the problem to a greater extent than they credit to him, and that he took some very significant measures to deal with it, to which they fail to give sufficient weight.

Governor Blanton ran for and was elected to the highest office in Tennessee state government. This fact guaranteed that for the term of office to which he was elected, he would be constantly in the limelight and every act and word would be subject to comment. The other two defendants accepted positions in state government in close proximity to its head. Under the First Amendment, neither the defendants nor any court in the United States could (or should) have prevented the public media comment which ensued. One of the trial judge's major problems was how to choose a jury without having all potential jurors repeatedly exposed or reexposed to adverse media opinion before the trial ever started. As we

read this record, he decided deliberately to avoid such re-exposure and reemphasis.

He did repeatedly ask the following question, addressed specifically to the nine jurors then seated in the jury box and phrased to fit specific circumstances of the lengthy voir dire examination:

> **[T]he test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?**

In varying language he repeated this question 18 additional times. The voir dire record, we believe, indicates that he was sensitive to every suggestion of prejudice which came either from jurors' answers or defense counsel suggestion, and in most instances responded with free use of his power to excuse a juror for cause. He exercised that power 42 times.

The trial judge acted on the assumption that all potential jurors in this case had been subjected to some portion of the massive media coverage concerning the defendants in this case. He apparently assumed that media coverage inevitably would have had some prejudicial impact and that the best he could do would be to persuade the individual members of the venire to disclose any biases derived therefrom along with any associations which might have a prejudicial effect. The critical question in this case is whether this approach, when considered together with the added precautionary measures taken by the judge, was within his judicial discretion and was so exercised as to produce an impartial jury.

The author of this opinion was initially persuaded by Judge Gibson's opinion for the panel that reversible error had been committed by denial of either judicial or defense examination

of individual jurors concerning specific instances of possibly prejudicial media influence. The factors which changed that opinion and which account for affirmance by a majority of the en banc court were: 1) careful reading of this record, 2) appreciation of the difficulty of preventing prejudicial error resulting from repetition during jury selection of media comment about defendants or from possible prejudicial statements from members of the venire as they were questioned about such comment, 3) appreciation of the sensitivity of the trial judge to any hint of bias and his free use of his power to excuse members of the venire from jury service in the interest of securing an unbiased jury, 4) the availability of the questionnaires to the defense as an important tool available to the defense for investigation of the venire, 5) the substantial increase in number of peremptory challenges which the trial judge approved and finally, 6) the fact that the trial judge found specifically (and with substantial record support) that the result achieved in this jury selection process was a fair and impartial jury.

A major aspect of appellants' claim of prejudice in the voir dire examination concerned pretrial publicity which pertained to other prosecutions of aids or relatives of Governor Blanton. In particular, some of these charges were to the effect that the Governor's aids were selling pardons to convicted criminals in the last days of the Blanton administration. At one point, the U.S. Attorney joined in a request for additional voir dire presumably related to this specific problem. While the trial judge denied the motions at that time, shortly thereafter, he addressed the prospective jurors as follows:

> THE COURT: Ladies and gentlemen, I have talked a lot about pretrial publicity that has occurred in connection with this case, the fact that you probably have read, heard things about the case. I have not discussed with you the possibility that you may have been familiar with some of the publicity that surrounded Mr. Blanton at the end of his term of office as governor. It seems

probable if you were in this State and area at this time that you read and saw and heard something about the circumstances.

Do any of you have recollection of any facts or circumstances which would cause you either to be inclined to hold that against Mr. Blanton, or on the other hand, to feel that he had been unfairly dealt with and should have been vindicated? We are going back a fair period of time.

But I ask you carefully to search your memories and your consciences on that point. And I ask you as a follow-up to that, does any of you remember anything concerning the circumstance under which Mr. Blanton left the governor's office which would in any way affect your judgment in this case or render you incapable of being completely fair and impartial concerning him and his part in this case?

While in this statement the trial judge avoided repeating the dramatic headlines which appeared above some of the news stories concerning the pardon sale charges, it seems obvious to us that the members of the venire both understood and responded to his concern. We believe this response is documented in the voir dire examinations recorded in Appendix pp. 1537-1728. All of these pages merit careful attention of any reviewing authority.

Why, then, have we indicated that his handling of the voir dire may not have been wholly adequate? The answer is that we do not wish to imply disapproval in this Circuit of all requests for individual questioning of jurors out of the presence of the entire venire, whether accomplished in chambers or at the bench. In many trials a limited number of defense questions, preferably submitted through the court with waiver by the questioner of any prejudicial effect of the answer, could be appropriate. We recognize that such a procedure in itself would invite immediate problems and attendant risks

as a result of the presence of the media. But we would not rule out the possibility that adequate warnings could be given to jurors not to expose themselves to the news media during the course of the trial and deliberations. This might be accompanied by warnings to the press of possible hazards of mistrial due to some printing or broadcasting of voir dire proceedings at a time preceding the announcement of the jury verdict. In many – indeed, most – cases, such measures could be effective. The trial judge obviously did not think they would be here.

As the dissenting opinion points out, the strategy employed by the trial judge in this case is unique. We do not recommend it for emulation unless under similarly extreme circumstances. These would include at least 1) charges generating great public concern, 2) statewide media saturation both before and during trial, and 3) then only if the voir dire is conducted by a trial judge as experienced in and as sensitive to the competing legitimate interests of the individual defendants and the state as proved to be true in this case.

Every criminal trial is, of course, at least to some degree unique. We do not seek to undertake the impossible task of specifying exactly how this trial judge (or any future one) should have employed his judicial discretion.

QUESTION 2

Did the trial judge abuse the broad discretion vested in him by the rulings of the Supreme Court of the United States in his impaneling of this jury?

We answer this question with a definite "No."

The United States Supreme Court has *not* established any per se rule which it requires trial judges to follow in the voir dire of a jury venire. *See Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981); *Murphy* v. *Florida*, 421 U.S. 794 (1975); *Beck* v. *Washington*, 369 U.S. 541 (1962); *Irvin* v. *Dowd*, 366

U.S. 717 (1960). These opinions emphasize the necessity of the exercise of trial judge discretion concerning the problems actually confronting him. In only one of these cases, *Irvin* v. *Dowd, supra*, did the United States Supreme Court reverse a conviction due to an unfair trial resulting from massive media pretrial publicity.

As noted above the trial judge in this case was faced with a problem. There was certain to be extraordinary publicity coverage *of the jury selection process*, with the potential of prejudicial error creeping into the trial itself either in the courtroom or in media coverage. The repeated reading to the entire venire of the most dramatic newspaper headlines (those accusing the Blanton administration of selling pardons for example) could have had an arguably serious prejudicial effect. Even if he had (as suggested above) waited until the very end of the selection process and then put the questions concerning prior media contact to each juror individually, he could not be certain that some juror or jurors would not read or hear about on television the very questioning from which they had been screened and about which they had been admonished. Abuse of judicial discretion simply does not fit this trial judge's handling of this difficult trial. See dialogue below:

> **Selected examples of the trial judge's handling of the voir dire**
>
> I have been designated to come down and participate in this trial because all of the federal judges in Tennessee have recused themselves from participating.[2] They asked to be excused from participating in this trial because each

[2] Actually all of the U.S. District Judges *in the Middle District of Tennessee* had disqualified themselves. After completion of the selection of the jury, the first trial judge in this case was forced to recuse himself due to the tragic sudden illness and subsequent death of his wife. He was replaced by a U.S. Circuit Judge from the Western District of Tennessee who completed the trial.

of them felt that there might be some reason that either he could not be completely fair and impartial, or that the public, and perhaps the parties themselves, the attorneys or other people, might feel that they could not be completely fair.

The only reason I mention that to you now is to indicate that if judges very freely and frankly remove themselves from the participation in a trial, if in the course of this inquiry any reason occurs to you why perhaps you could not be fair, you should have no reluctance whatever in indicating that fact to the Court.

The questions to be asked may indicate to the Court or to counsel some reason that any one of you might have difficulty in being fair in this case. And perhaps even more importantly, this inquiry may indicate to you yourself some reason why you might have difficulty being fair and impartial. It may be perhaps very likely something you have never thought about yourself. But there may be a suggestion contained in a question that will cause you to say, "Perhaps I would have difficulty being fair." And in fairness and honesty to the parties, indicate that fact to the Court. And of course, you will be excused from any further duties in the matter.

Ladies and gentlemen of the venire, while the questions at this particular stage of the procedure are directed primarily to the 12 persons seated in the jury box, I also ask that each of you listen carefully to all of the questions that are asked so that if at some later stage of the proceeding you are asked to occupy a seat in the jury box, it will not be necessary to repeat all of the questions which will be asked.

In that regard and for that purpose, I ask whether all of you can hear me. The ladies and gentlemen there in the back of the courtroom, are you having any difficulty hearing at all? I take it that the public address system is making it possible for you to follow the proceedings.

Ladies and gentlemen, if you have an affirmative answer to a question, if there is some suggestion made in a question that you know a person or you have a feeling about a given matter, raise your hand and indicate that circumstance to the Court. We will then probably follow up on that question.

And I urge you to be extremely careful in answering any question that may be put to you. Answer only the precise question asked. Do not volunteer anything beyond the scope of the question itself. And again, I ask that you listen carefully to the question and then limit your answer precisely to answering the question, without volunteering any additional information or any additional opinion, anything of that nature.

For instance, if you are asked if you know a given witness and you say, "Yes." And you are asked if the fact that you know that person would make you more apt to believe him or disbelieve him, answer that question simply yes or no. Do not say, "I would never believe him because I know him to be a liar."

Put it in that form. You may consider that a little strong, but prospective jurors have made statements like that. And the remedies that are required after a statement like that is made in the courtroom are strenuous ones. So please don't volunteer any additional information, and particularly, express any opinions that you have not been asked to express.

Obviously, ladies and gentlemen, it would be difficult for you to be fair and impartial if you knew any of the parties well. And I therefore introduce them to you in the order that they are named in the indictment.

At this point the trial judge identified the defendants and those associated with the prosecution and the defense as counsel.

In the same general context, ladies and gentlemen, I

recognize that partially because of the fact that these defendants held such offices, this entire matter has been the subject of attention of the news media. I am sure that all of you have at some time read something about this case in the newspapers, have heard something concerning it on the radio at some time, or have even seen or heard reference to it on television at some time.

Similarly, it is entirely likely that some of you may have formed some tentative opinion concerning the probable guilt or innocence of some of the persons involved, including these defendants. However, the test to be applied in determining your qualifications to sit as jurors is not whether you have heard something about the case from the news media or whether you have formed any kind of a tentative opinion based on such reports. Rather – and I put this in the form of a question – the test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?

I take it from your silence that none of you feel that he or she has been prejudiced by what you may have heard or seen.

Yes, ma'am?

JUROR NO. 1 (SHEILA GIBSON): I have been sitting here listening to you. And I am not sure that I would be impartial. I do have somewhat of an idea, from the things I have read and heard.

THE COURT: Thank you very much. You may be excused.

QUESTION 3

Did the voir dire examination of jurors suffice to produce an impartial jury and a fundamentally fair trial?

The answer to this question is "Yes."

The trial judge elected to deal with the problem by 1) extensive questioning concerning prior media impact and juror associations, coupled with many dismissals based on even hints of possible prejudice, 2) very substantial increases in the number of peremptory challenges available to each defendant (30 in all), and 3) reliance on defendants' use of detailed questionnaires concerning all potential jurors coupled with sensitive responses by the court to any of defendants' challenges arising from such use.

What follows are selected illustrations or results of each of these techniques as the trial judge employed them:

1) Media impact and juror associations.

What follows are excerpts from the 289 page voir dire examination of jurors:

> [THE COURT:] Is there anything in that fact, the fact that you are a state employee, that would make this a difficult case for you to participate in?
>
> [POTENTIAL JUROR:] MS. YATES: No, not that I know of, because nothing has been discussed since I have been in the Mental Health Department over at Central State. It has never been mentioned between the two of us in the office.
>
> THE COURT: Do you hold a civil service position?
>
> MS. YATES: No.
>
> THE COURT: I am not familiar enough with Tennessee structure to perhaps intelligently approach this. But are you a provisional employee, or what is your status?
>
> MS. YATES: I am the clerk ordering in the Maintenance Department. I order all the supplies.

THE COURT: But you have no assured tenure in that position?

MS. YATES: (Shakes head.)

THE COURT: And you are, to put it most bluntly, you would be subject to discharge without cause; it that correct?

MS. YATES: No, I am pretty well situated.

THE COURT: But in any event, you do not hold your position on the basis of any kind of civil service or any protection?

MS. YATES: No, sir, I am not.

THE COURT: So it is at least conceivable that if there are any political ramifications that might be attributed to your vote in this case, you might suffer some consequences, at least theoretically?

MS. YATES: I don't know about that.

THE COURT: Well, I doubt very seriously if any of these things would happen, Ms. Yates. But discretion is the better part of valor. And you will be excused.

What is your name, sir?

JUROR NO. 10 (LARRY G. WILLIAMS): Williams.

THE COURT: Have you heard all the questions that have been asked here this morning and afternoon?

MR. WILLIAMS: Yes, sir.

THE COURT: Has anything that's been asked or said indicate to you any reason why you should not sit as a juror here?

MR. WILLIAMS: Yes, sir. You mentioned the media. And the newspaper. That.

THE COURT: You mean you have read them, and you have formed a conclusion?

MR. WILLIAMS: Yes, sir.

THE COURT: Very well, we appreciate your frankness. You may be excused. (Tr. 145-46)

• • •

[THE COURT:] I'll ask all of you, has anything that has been said, or any question that's been asked, suggested to any one of you any reason why there might be

a problem concerning your participation as a fair and impartial juror? Yes, sir?

ALTERNATE NO. 4 (WOODROW LESTER) Due to the nature of the trial– I'm a trustee at Temple Baptist Church in Murfreesboro. And my wife is a bookkeeper there. And I'm – due to the nature of the trial, I may not be able to make a just judgment concerning my – concerning the nature of the trial. And it may cause undue ridicule or embarrassment as far as the church work goes.

THE COURT: I really don't particularly understand why.

MR. LESTER: Well, if– They may give me a, you know – may give me a hard time about it if some – if Mr. Blanton and the others were acquitted.

THE COURT: Is this essentially a religious organization by which you are employed?

MR. LESTER: Yes, sir. Temple Baptist Church.

THE COURT: Are you suggesting that there is a religious organization that is not willing to have its employees participate fully in civic affairs?

MR. LESTER: I'm sure they wouldn't mind me participating in it in as far as the trial and jury goes. But I don't know about this particular case.

THE COURT: You mean solely on the basis of the duration of it?

MR: LESTER: No, sir. On the subject matter. Concerning the alcoholic beverages. It's in our church covenant that we don't–

THE COURT: I misunderstood what you were saying, Mr. Lester. You may be excused. Thank you for your frankness. (Tr. 251-52)

• • •

THE COURT: Mr. Bell, would your answer to any question that has been asked here today be any different than the answers of the other five persons seated tentatively as alternate jurors here this morning?

MR. BELL: Yes, it would.

THE COURT: There would be a difference?

MR. BELL: Yes, sir.

THE COURT: What is the difference, sir?

MR. BELL: I have already formed my opinion?

THE COURT: You do have an opinion concerning the ultimate issues in the case?

MR. BELL: Yes, sir.

THE COURT: Thank you, Mr. Bell. You may be excused.

Good morning, Mr. Pigg. I'll amend that. Good afternoon.

Have you been able to hear everything that's happened here today?

ALTERNATE NO. 2 (JOE H. PIGG): Yes, I have, Your Honor.

THE COURT: Has anything that's been said or questions that have been asked indicated to you any reason why you could not serve as a fair juror in this case?

MR. PIGG: Your Honor, I would like to be excused for the reason I've already formed an opinion.

THE COURT: You may be excused.

I'm having a little trouble, reading your name.

ALTERNATE NO. 2 (MARGARET L. KEMNETZ) Kemnetz.

THE COURT: Kemnetz, thank you. Is the third letter an "M"?

MS. KEMNETZ: Yes.

THE COURT: All right. Ms. Kemnetz, while you were seated in the back of the jury room (sic.), were you able to hear all the statements and questions of the Court?

MS. KEMNETZ: Yes, sir.

THE COURT: Did anything that's been said or asked suggest to you any reason why you could not be a fair juror in this case?

MS. KEMNETZ: Yes, sir. I'm acquainted with Bernie Weinstein. And I already have formed an opinion.

THE COURT: Will the reporter repeat that answer to the Court?

MS. KEMNETZ: I'm acquainted—

THE COURT: No, I don't want you to—

THE REPORTER: "I'm acquainted with Bernie Weinstein. And I already have formed an opinion."

THE COURT: All right. Thank you very much. You may be excused. (Tr. 279-81)

• • •

THE COURT: In addressing myself to the newly seated alternates, again we ask whether you have been able to hear everything that's been said here this morning. Have you heard all the statements of the Court and all the questions that have been asked?

On the basis of what you have heard, do you now feel — do you know of any reason why you perhaps could not be a fair and impartial juror in this case?

Mr. Hibbett?

ALTERNATE NO. 1 (EUGENE HIBBETT) Yes, sir. I don't think I would be a good candidate for either side. I know many—

THE COURT: Don't express any opinions. Do you know persons who are involved in the case?

MR HIBBETT: Yes.

THE COURT: You indicated for either side.

MR. HIBBETT: That's right.

THE COURT: But in any event, your own personal feeling, Mr. Hibbett, is that you — it would be difficult for you to be fair and impartial if you were asked to serve, on the basis of your knowledge of some of the people involved?

MR. HIBBETT: Yes.

THE COURT: Thank you very much, sir. You may be excused.

THE COURT: Ms. Meehan?

ALTERNATE NO. 1 (NANCY L. MEEHAN) Yes, sir.

THE COURT: Have you heard everything that's been said?

MS. MEEHAN: Yes, I have.

THE COURT: Is there anything that suggested to you any reason you could not be a fair and impartial juror in this case?

MS. MEEHAN: Two reasons. One, I'm waiting approval on my application to the police department. Two, I've already formed an opinion.

THE COURT: What was the second one?

MS. MEEHAN: I've already formed an opinion on the outcome.

THE COURT: Very well. Thank you, Ms. Meehan. You may be excused.

THE COURT: Good morning, Mr. Hicks. Have you heard everything that's happened here this morning?

ALTERNATE NO. 1 (WILLIAM M. HICKS) Yes, sir.

THE COURT: Has any of it suggested any reason why you couldn't serve fairly and impartially in this case?

MR. HICKS: I'm a long-time friend of one of the witnesses, Mayor Richard Fulton. He and I were raised up practically together.

THE COURT: You grew up with Mr. Fulton?

MR. HICKS: Yes, sir.

THE COURT: Do you have a continuing contact with him?

MR. HICKS: Yes. We went all the way through school together. Known him since childhood.

THE COURT: Do you think the fact that you know him and continue to be a close friend of his, would that make it difficult for you to participate in this case?

MR. HICKS: I'm afraid, Your Honor, it would.

THE COURT: Very well. You may be excused.

Mr. Alexander, have you heard everything that's happened today?

ALTERNATE NO. 1 (JAMES H. ALEXANDER) Yes, sir.

THE COURT: Have any of the statements of the Court or questions indicated to you any reason why if you were seated as an alternate, and then were re-

quired to serve as a member of the Jury itself, that you could not be fair?

MR. ALEXANDER: Well, yes, sir, Your Honor.

THE COURT: I don't understand. You mean, yes, there is a reason? Or you—

MR. ALEXANDER: Yes, sir.

THE COURT: What is that reason?

MR. ALEXANDER: Well—

THE COURT: Don't state an opinion, sir. Do you know somebody, or—

MR. ALEXANDER: I'm acquainted with Bob Frensley.

THE COURT: And because of that acquaintanceship or friendship, whatever it is, —

MR. ALEXANDER: Friendship.

THE COURT: — you feel it would be embarrassing or difficult for you to participate in this case? It that what you're saying to the Court?

MR. ALEXANDER: Well, not necessarily embarrassing. But I have respect for him. And I take his word on anything he says.

THE COURT: So that you would be inclined to give greater weight to his testimony than perhaps to some other person who testifies whom you do not know?

MR. ALEXANDER: Yes, sir.

THE COURT: Thank you, Mr. Alexander. You may be excused.

Good morning, Mr. Miller. Have you been able to hear all the questions and statements?

ALTERNATE NO. 1 (WALTER KENNETH MILLER) Yes.

THE COURT: Has anything suggested to you any reason that you would have trouble being fair if selected as a juror?

MR. MILLER: Due to the extent of the coverage of the press, I have already formed an opinion. I feel like I would be an affected witness.

THE COURT: Very well, you may be excused.

(Tr. 263-67)

Judge Engel's dissent criticizes the voir dire as consisting of "a single question eliciting only a juror assurance (through silence) of impartiality." [dissent at p.3] As can be seen from excerpts of the transcript, however, the voir dire was much more extensive than indicated by the dissent. We believe that the trial judge did succeed in securing the cooperation of the jurors in disclosing possible bias. We also believe that he reacted quickly and effectively to protect defendants from any such bias.

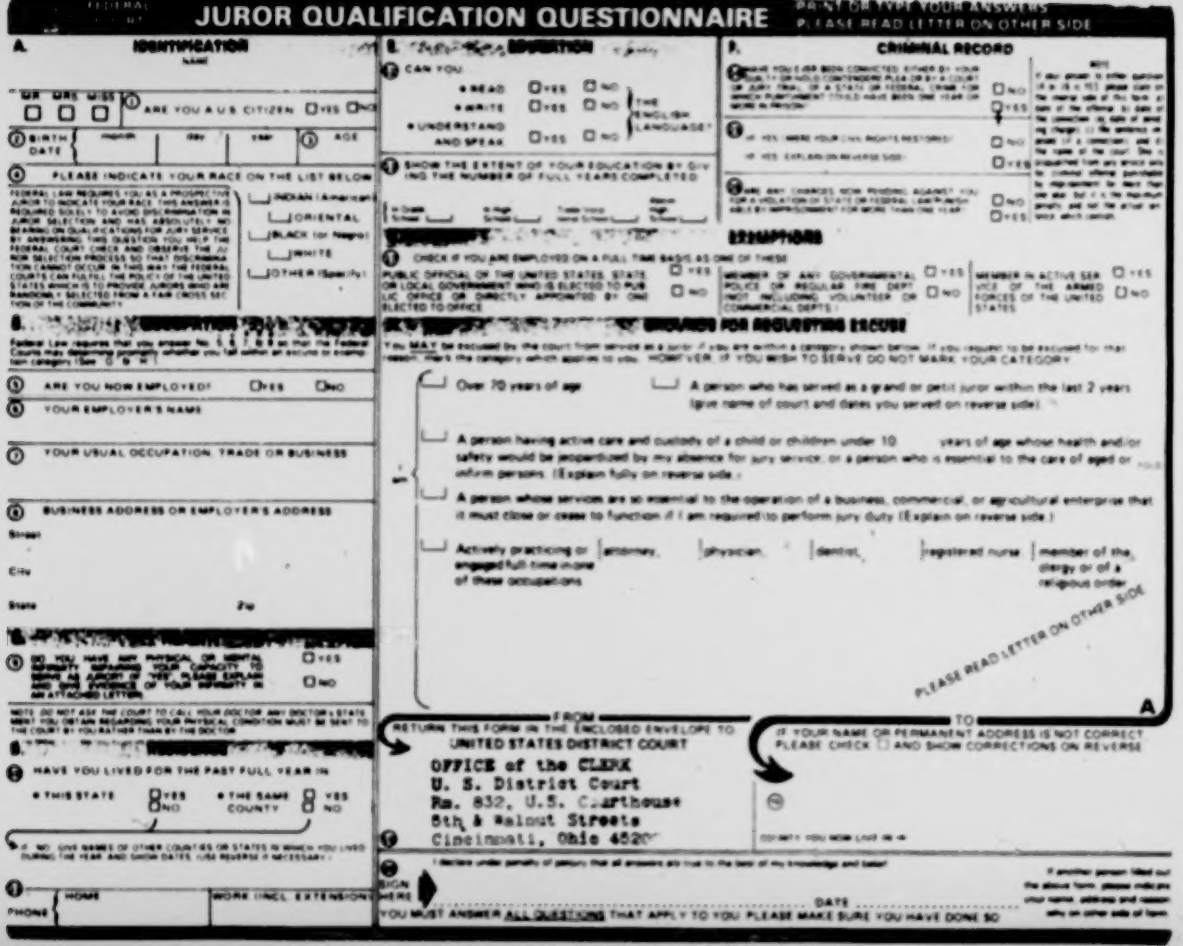
2) Peremptory Challenges

Under the applicable rule, Federal Rules of Criminal Procedure 24(b), the government was entitled to six peremptory challenges and the three defendants were entitled to ten. The defendants sought an additional twenty challenges, ten for each defendant, and the government objected. The trial judge granted defendants' request. Only one of the defendants used all peremptory challenges.

While we recognize that appellants contend in this case that their use of peremptory challenges was hampered by their inability to explore each juror's contact with media expressions prior to trial, we also are profoundly aware that the most searching cross-examination personally conducted by a lawyer for a defendant might not suffice to bring into the trial record a secretly held bias on the part of a juror against a particular defendant. It is, of course, in part for that reason that twelve jurors are chosen and the verdict of guilt must be unanimous. The trial judge's grant of so many additional peremptory challenges, coupled with the information supplied as to each prospective juror in the official questionnaire, contributes substantially to our conclusion that in sum total the jury voir dire as conducted was within the discretion of the trial judge.

3) The Questionnaires

As indicated above, each juror in the entire venire was asked to and did furnish answers to the official questionnaire, which is produced on the following page.



FEDERAL [illegible]

JUROR QUALIFICATION QUESTIONNAIRE

PRINT OR TYPE YOUR ANSWERS
PLEASE READ LETTER ON OTHER SIDE

A. IDENTIFICATION

NAME

MR. MRS. MISS ☐ ☐ ☐

1. ARE YOU A U.S. CITIZEN ☐YES ☐NO
2. BIRTH DATE { month | day | year }
3. AGE
4. PLEASE INDICATE YOUR RACE ON THE LIST BELOW

FEDERAL LAW REQUIRES YOU AS A PROSPECTIVE JUROR TO INDICATE YOUR RACE. THIS ANSWER IS REQUIRED SOLELY TO AVOID DISCRIMINATION IN JUROR SELECTION AND HAS ABSOLUTELY NO BEARING ON QUALIFICATIONS FOR JURY SERVICE. BY ANSWERING THIS QUESTION YOU HELP THE FEDERAL COURT CHECK AND OBSERVE THE JURY SELECTION PROCESS SO THAT DISCRIMINATION CANNOT OCCUR. IN THIS WAY THE FEDERAL COURTS CAN FULFILL THE POLICY OF THE UNITED STATES, WHICH IS TO PROVIDE JURORS WHO ARE RANDOMLY SELECTED FROM A FAIR CROSS SECTION OF THE COMMUNITY.

☐ INDIAN (American)
☐ ORIENTAL
☐ BLACK (or Negro)
☐ WHITE
☐ OTHER (Specify)

B. [illegible] EDUCATION

1. CAN YOU
   - READ ☐YES ☐NO
   - WRITE ☐YES ☐NO
   - UNDERSTAND AND SPEAK ☐YES ☐NO

   } THE ENGLISH LANGUAGE?

2. SHOW THE EXTENT OF YOUR EDUCATION BY GIVING THE NUMBER OF FULL YEARS COMPLETED

Grade School	High School	Trade Voca. Some School	Attend. High School	College

[illegible]

1. CHECK IF YOU ARE EMPLOYED ON A FULL TIME BASIS AS ONE OF THESE

PUBLIC OFFICIAL OF THE UNITED STATES, STATE OR LOCAL GOVERNMENT WHO IS ELECTED TO PUBLIC OFFICE OR DIRECTLY APPOINTED BY ONE ELECTED TO OFFICE ☐YES ☐NO

C. [illegible] OCCUPATION

Federal Law requires that you answer No. 5 6 7 8 so that the Federal Courts may determine (among other things) whether you fall within an excuse or exemption category (See D & E)

5. ARE YOU NOW EMPLOYED? ☐YES ☐NO
6. YOUR EMPLOYER'S NAME
7. YOUR USUAL OCCUPATION, TRADE OR BUSINESS
8. BUSINESS ADDRESS OR EMPLOYER'S ADDRESS

Street
City
State Zip

D. [illegible] DISQUALIFICATION

9. DO YOU HAVE ANY PHYSICAL OR MENTAL DISABILITY IMPAIRING YOUR CAPACITY TO SERVE AS JUROR? IF YES, PLEASE EXPLAIN AND GIVE EVIDENCE OF YOUR DISABILITY IN AN ATTACHED LETTER. ☐YES ☐NO

NOTE: DO NOT ASK THE COURT TO CALL YOUR DOCTOR. ANY DOCTOR'S STATEMENT YOU OBTAIN REGARDING YOUR PHYSICAL CONDITION MUST BE SENT TO THE COURT BY YOU RATHER THAN BY THE DOCTOR.

E. [illegible] RESIDENCE

10. HAVE YOU LIVED FOR THE PAST FULL YEAR IN
    - THIS STATE ☐YES ☐NO
    - THE SAME COUNTY ☐YES ☐NO

IF NO, GIVE NAMES OF OTHER COUNTIES OR STATES IN WHICH YOU LIVED DURING THE YEAR AND SHOW DATES. USE REVERSE IF NECESSARY.

11. PHONE { HOME | WORK (INCL. EXTENSION) }

F. CRIMINAL RECORD

12. HAVE YOU EVER BEEN CONVICTED, EITHER BY YOUR PLEA OF GUILTY OR NOLO CONTENDERE PLEA OR BY A COURT OR JURY TRIAL, OF A STATE OR FEDERAL CRIME FOR WHICH PUNISHMENT COULD HAVE BEEN ONE YEAR OR MORE IN PRISON? ☐NO ☐YES

13. IF YES, WERE YOUR CIVIL RIGHTS RESTORED? ☐NO ☐YES
    IF YES, EXPLAIN ON REVERSE SIDE

14. ARE ANY CHARGES NOW PENDING AGAINST YOU FOR A VIOLATION OF STATE OR FEDERAL LAW PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR? ☐NO ☐YES

NOTE: If you answer [illegible] to either question (A or B) please [illegible] the charges, date of [illegible] the sentence, name of [illegible] and the name of the court. This is important from any errors who by [illegible] offering participation by misrepresentation by others. Your [illegible] and [illegible] of it. No [illegible] penalty are for the actual [illegible] which cannot.

G. EXEMPTIONS

MEMBER OF ANY GOVERNMENTAL POLICE OR REGULAR FIRE DEPT. (NOT INCLUDING VOLUNTEER OR COMMERCIAL DEPTS.) ☐YES ☐NO

MEMBER IN ACTIVE SERVICE OF THE ARMED FORCES OF THE UNITED STATES ☐YES ☐NO

H. [illegible] GROUNDS FOR REQUESTING EXCUSE

You MAY be excused by the court from service as a juror if you are within a category shown below. If you request to be excused for that reason, mark the category which applies to you. HOWEVER, IF YOU WISH TO SERVE DO NOT MARK YOUR CATEGORY.

☐ Over 70 years of age

☐ A person who has served as a grand or petit juror within the last 2 years (give name of court and dates you served on reverse side)

☐ A person having active care and custody of a child or children under 10 years of age whose health and/or safety would be jeopardized by my absence for jury service, or a person who is essential to the care of aged or infirm persons. (Explain fully on reverse side.)

☐ A person whose services are so essential to the operation of a business, commercial, or agricultural enterprise that it must close or cease to function if I am required to perform jury duty. (Explain on reverse side.)

☐ Actively practicing or engaged full time in one of these occupations: attorney, physician, dentist, registered nurse, member of the clergy or of a religious order

PLEASE READ LETTER ON OTHER SIDE

A

FROM

RETURN THIS FORM IN THE ENCLOSED ENVELOPE TO:
UNITED STATES DISTRICT COURT
OFFICE of the CLERK
U. S. District Court
Rm. 832, U.S. Courthouse
5th & Walnut Streets
Cincinnati, Ohio 4520[illegible]

TO

IF YOUR NAME OR PERMANENT ADDRESS IS NOT CORRECT PLEASE CHECK ☐ AND SHOW CORRECTIONS ON REVERSE

I declare under penalty of perjury that all answers are true to the best of my knowledge and belief.

SIGN HERE

DATE

YOU MUST ANSWER ALL QUESTIONS THAT APPLY TO YOU. PLEASE MAKE SURE YOU HAVE DONE SO

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THE LAW OF THIS CASE

The fundamental standard of review of a trial judge's conduct of a voir dire examination is set forth in the most dramatic case where the Supreme Court has dealt with the central question of this case.

In *Irvin* v. *Dowd*, 366 U.S. 717, 722-24 (1960), the Supreme Court, with Justice Tom Clark writing for the Court, said as follows:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey* v. *Ohio*, 273 U. S. 510. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807).[3] "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds* v. *United States*, 98 U. S. 145, 155.
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> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days

[3] "[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him."

of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies* v. *Illinois*, 123 U. S. 131; *Holt* v. *United States*, 218 U. S. 245; *Reynolds* v. *United States*, *supra*.

The adoption of such a rule, however, "cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." *Lisenba* v. *California*, 314 U. S. 219, 236. As stated in *Reynolds*, the test is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact . . . ." At p. 156. "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside . . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed." At p. 157. As was stated in *Brown* v. *Allen*, 344 U. S. 443, 507, the "so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors.

The rule was established in Reynolds that "[t]he finding

> of the trial court upon that issue [the force of a prospective juror's opinion] ought not be set aside by a reviewing court, unless the error is manifest." 98 U. S., at 156.

We find no "manifest" error in the trial judge's ruling on the impartiality of this jury. Indeed the contrast between *Irvin* v. *Dowd, supra* and our instant case is very great. In the *Irvin* case, Justice Clark pointed out:

> Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, cf. *Stroble* v. *California*, 343 U.S. 181, was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations.

In our present case *no* juror who helped determine the case expressed a pretrial conviction of appellants' guilt.

Infinitely closer to our present case are the facts and law in a case written for the U.S. Supreme Court by Justice Clark – the same Justice who wrote the *Irvin* v. *Dowd* opinion.

In *Beck* v. *Washington*, 369 U.S. 541, 555-58 (1962), Justice Clark said:

> As in his grand jury attack, petitioner makes no claim that any particular petit juror was biased. Instead, he states the publicity which prevented the selection of a fair grand jury also precluded a fair petit jury. He argues that such a strong case of adverse publicity has been proved that any jury selected in Seattle at the time he was tried must be held to be presumptively biased and that the trial court's adverse rulings on his motions for a change of venue and for continuances were therefore in error. Of course there could be no constitutional infirmity in these rulings if petitioner actually received a trial by an impartial jury. Hence, our inquiry is addressed to that subject.

Petitioner's trial began early in December. This was nine and one-half months after he was first called before the Senate Committee and almost five months after his indictment. Although there was some adverse publicity during the latter period which stemmed from the second tax indictment and later Senate hearings as well as from the trial of petitioner's son, it was neither intensive nor extensive. The news value of the original "disclosures" was diminished, and the items were often relegated to the inner pages. Even the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness. If there was a campaign against him as petitioner infers, it was sidetracked by the appearance of other "labor bosses" on the scene who shared the spotlight.

The process of selecting a jury began with the exclusion from the panel of all persons summoned as prospective jurors in the November 12 trial of Dave Beck, Jr. In addition, all persons were excused who were in the courtroom at any time during the trial of that case. Next, the members were examined by the court and counsel at length. Of the 52 so examined, only eight admitted bias or a preformed opinion as to petitioner's guilt and six others suggested they might be biased or might have formed an opinion — all of whom were excused. Every juror challenged for cause by petitioner's counsel was excused; in addition petitioner was given six peremptory challenges, all of which were exercised. Although most of the persons thus selected for the trial jury had been exposed to some of the publicity related above, each indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an open mind disregarding anything he had read on the case.

A study of the *voir dire* indicates clearly that each juror's qualifications as to impartiality far exceeded the minimum standards this Court established in its earlier

cases as well as in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), on which petitioner depends. There we stated:

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*, at 723.

We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law. Compare *Irvin* v. *Dowd*, *supra*, at 723-728, where sensational publicity adverse to the accused permeated the small town in which he was tried, the *voir dire* examination indicated that 90% of 370 prospective jurors and two-thirds of those seated on the jury had an opinion as to guilt, and the accused unsuccessfully challenged for cause several persons accepted on the jury. The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt. In addition, we note that while the Washington Supreme Court was divided on the question of the right of an accused to an impartial grand jury, the denial of the petitioner's motions based on the bias and prejudice of the petit jury did not raise a single dissenting voice.

"While this Court stands ready to correct violations of constitutional rights, it also holds, that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'"

United States ex rel. Darcy v. *Handy*, 351 U. S. 454, 462 (1956). This burden has not been met.

This circuit has adopted the above *Irvin* v. *Dowd* standard in the following language:

> "The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent jurors." ' *Irvin* v. *Dowd*, 366 U.S. at 722 [81 S.Ct. at 1642]." *Murphy, supra*, [421 U.S.] at 799, 95 S.Ct. at 2035. It is not necessary that the jurors be totally ignorant of the facts and issues involved. *Irvin, supra*, at 722, 81 S.Ct. at 1642.
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> > To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. (citations omitted).
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> *Id.* at 723, 81 S.Ct. at 1642.
> (Citations omitted.)
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> During the voir dire, Juror Yell was asked if there was any reason she might be unable to return an unbiased and unprejudiced verdict. She answered "No." At the hearing after the trial, she indicated that the conversation she overheard had no bearing on her decision. Although a juror's assurance of impartiality is not dispositive of petitioner's rights, a trial judge's finding of impartiality should be set aside only upon a showing that prejudice is manifest. *Irvin, supra*, 366 U.S. at 723, 81 S.Ct. at 1642.

Haney v. *Rose*, 642 F.2d 1055, 1059-60 (6th Cir. 1981).

Under this legal precedent it is significant that, following the voir dire examination, Judge Peck denied further motions regarding the conduct of the voir dire saying:

> [F]or whatever it is worth, I have the view that the Jury that has been selected is as fair and impartial a Jury as could be obtained. (Tr. at 291)

We now hold, both for the reasons set forth above and for one additional reason set forth below, that the trial judge did not abuse his discretion in the handling of jury selection in this trial.

Defendants have adduced no proof that this was a biased jury.

At the en banc hearing of this case, the author of this opinion asked lead counsel for Governor Blanton whether there was evidence of jury bias. The response was made wholly in relation to one juror and cited evidence which we deem quite inconclusive. We have searched this record for any other such evidence pertaining to periods before, during, or posttrial and have found none.

For the reasons set forth above, we believe that the jury selection process, although not perfect, was nonetheless both fair and effective in that it resulted in an impartial jury.

We find no merit as to other issues, and in this regard adopt the panel opinion's dispositions for the reasons stated therein. The judgment of the District Court is affirmed.

KENNEDY, Circuit Judge. I write separately only to highlight what I consider to be the significant fact that defense counsel never complained to the District Court about the group-nature of the inquiry of the first group of prospective jurors into whether they could lay aside any impressions or opinions that they may have formed and render a verdict based solely on the evidence presented in court. Defense counsel did unsuccessfully assert a right to participate in the voir dire examination. There is no evidence, however, that defense counsel ever requested an individual voir dire by the judge on the question of the jurors' ability to lay aside any impressions or opinions that they may have formed. Moreover, there is every indication on the record that the trial judge would have complied with such a request had it been made. Whenever a prospective juror indicated that she or he had formed some opinion concerning the guilt or innocence of the defendants, the trial judge made further inquiry into that juror's ability to lay aside the opinion. Also, whenever a new juror was called to replace someone who had been excused, the trial judge inquired into her or his ability to render a verdict based solely on the evidence presented in court. At no point did defense counsel request that the original veniremen be *individually* questioned on that issue. Accordingly, defendants should not now be heard to complain that group voir dire examination was insufficient to produce an impartial jury and a fundamentally fair trial.

ENGEL, Circuit Judge, dissenting.

The en banc opinion today establishes a new rule of law governing jury selection in federal trials involving widespread pretrial publicity.

That new rule is that where inflammatory pretrial publicity is pervasive, inquiry into an individual juror's knowledge and predisposition is superfluous. The only necessary inquiry, according to the majority, is whether the juror believes in his own mind that he can lay aside such knowledge and preconceived notions and decide the case only upon the evidence presented. The en banc opinion further imposes upon the defense the burden of proving prejudice although the trial court effectively precluded any meaningful inquiry needed to establish it. These propositions overrule established precedent. I therefore respectfully dissent.

I remain completely satisfied with the careful analysis and scholarship of Judge Gibson in the original panel decision, *United States* v. *Blanton*, 700 F.2d 298 (6th Cir. 1983).[1] That opinion fully discusses the law and policies concerning the adequacy of *voir dire* in cases of widespread pretrial publicity. These additional comments supplement Judge Gibson's fine opinion, addressing additional concerns and, occasionally, misconceptions which I believe have developed during the course of the en banc proceedings.

I.

The en banc opinion is unprecedented in the scope of the limitations it permits upon jury *voir dire* in trials involving widespread, inflammatory publicity. *Not one* question was

[1] The published opinion lists Bailey Brown as trial judge. 700 F.2d at 298. The jury selection process under scrutiny, however, took place before another judge of this circuit. Judge Brown took over after jury selection, when the original judge, through circumstances completely beyond his control, was unable to continue. Both were Circuit Judges, and each was successively designated by the Chief Judge of this Circuit to sit as trial judge due to the self-disqualification of all the district judges in the Middle District of Tennessee.

permitted to be put to the prospective jurors, either individually or as a group, concerning the sources of publicity they had been exposed to or the content of such sources they might have remembered.

Judge Gibson's opinion makes clear that although habeas corpus review of jury selection is judged solely on a constitutional standard, *see United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462 (1956) (defendant must show bias not as a matter of speculation, but as a demonstrable reality), review of federal prosecutions also rests on the reviewing court's supervisory power. *See Marshall* v. *United States*, 360 U.S. 310 (1959) (per curiam); *Murphy* v. *Florida*, 421 U.S. 794 (1975). Thus, in federal cases involving "pervasive" pretrial publicity, prejudice is presumed. *Murphy*, 421 U.S. at 798-99; *see also, Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961); *Goins* v. *McKeen*, 605 F.2d 947, 951 nn. 7 & 8 (6th Cir. 1979). Once prejudice is so established, it is the trial judge's duty to assess each potential juror's impartiality — *i.e.*, his ability to lay aside his impression or opinion and render a verdict based on the evidence. *Reynolds* v. *United States*, 98 U.S. 145, 155 (1878). Finally, it is "the duty of the Court of Appeals to *independently evaluate* the voir dire testimony of the impaneled jurors." *Irvin*, 366 U.S. at 723 (emphasis added).

The heart of the issue in this appeal is how much information the *voir dire* must elicit concerning the source and content of a venireman's knowledge of the case in order that the trial court and, on review, the court of appeals may assess jury impartiality effectively. Judge Gibson's opinion relies on the established principle that "[t]he juror's assurances that he is equal to this task [of laying aside preconceptions] cannot be dispositive of the accused's rights . . . ." *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). That same principle has guided our circuit in *United States* v. *Ciacalone*, 588 F.2d 1158, 1163 (6th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979), and *Goins* v. *McKeen*, 605 F.2d 947, 952-53 (6th Cir. 1979).

To my knowledge, no court of appeals has ever before affirmed a conviction in a case of widespread and inflammatory pretrial publicity when the entire *voir dire* concerning publicity consisted of a single question eliciting only a juror assurance (through silence) of impartiality:

> [T]he test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?

App. 1487.

As both the en banc opinion and Judge Gibson's panel opinion make clear, the above question was preceded by frequent admonitions specifically cautioning the jurors to refrain from disclosing any further information bearing on possible bias, either as to source or as to content:

> And I urge you to be *extremely careful* in answering any question that may be put to you. *Answer only the precise question asked. Do not volunteer anything* beyond the scope of the question itself. And again, I ask that you listen carefully to the question and then *limit your answer precisely* to answering the question, *without volunteering any additional information or any additional opinion*, anything of that nature.

(emphasis added). App. 1468-69. Similar precautions were repeated throughout the entire *voir dire*. *See, e.g.*, 1479-80, 1506-07. In addition the trial judge on several occasions chided (albeit gently) jurors whose answers or comments threatened to disclose any specific knowledge or opinion. *See, e.g.*, App. 1550, 1578, 1579.

It is singularly curious that the reason the trial judge apparently felt that more specific questioning was unnecessary

was that he assumed that the entire venire had been exposed to the pretrial publicity which even the en banc majority admits was "massive." En banc Op. at 6, *ante*, *quoting* 700 F.2d at 302. From this undeniable fact, the trial judge and the en banc majority were led to the totally erroneous conclusion that it was therefore unnecessary to inquire into the particular knowledge of any individual juror or the source from which that knowledge was derived. This conclusion directly conflicts with our circuit's holding in *Goins* v. *McKeen*, 605 F.2d at 952-53.

In *Goins* v. *McKeen*, our court indicated that juror exposure to inflammatory publicity — such as that so plainly spread upon this record — "render[s] the circumstances inherently prejudicial and . . . a violation of petitioner's constitutional right to trial by an impartial jury may be presumed." *Id.* at 954. In contrast, the trial court here assumed that assurances gained from silence were sufficient to overcome that presumption. The en banc opinion thrusts the burden upon the defense to prove prejudice even though it has been presumptively established under the law. *Compare* En banc Op. at 31, *ante*, *with e.g.*, *Murphy*, 421 at 798-99.

II.

The en banc decision is completely inconsistent with Judge Celebrezze's opinion in *United States* v. *Johnson*, 584 F.2d 148 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979). In *Johnson*, we set out the proper *voir dire* procedure concerning pretrial publicity. Although trial judges have broad discretion in conducting *voir dire*, we recognized that "this discretion is limited by the 'essential demands of fairness.'" *Johnson*, 584 F.2d at 155, *citing*, *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). Fairness requires that the veniremen not only be questioned about their ability to disregard pretrial publicity but also that they be questioned concerning "the sources and intensity of [their] exposure" to the pretrial publicity. *Johnson*, 584 F.2d at 155.

In *Johnson*, our court also addressed the circumstances in which the use of "content" questions is appropriate. "Content" questions request the prospective juror to "recite everything he remembers about the topic of inquiry." *Id.* at 156 n.17. In the context of pretrial publicity, a "content" question would be asked to determine what a prospective juror remembered about a specific article. Although "the better practice is for the court to ask content questions of any juror who has been exposed to pretrial publicity which the court knows to be of clear prejudicial potential," *id.* at 156 n.19, we need not consider the issue of content questioning since defendants *were never given an opportunity to discover the sources of what the prospective jurors had read or seen.* The trial judge thus violated the fundamental rule that veniremen must be questioned concerning "the sources and intensity of [their] exposure" to pretrial publicity. *Id.* at 155. "Content" questions need be asked only where "the nature of juror exposure to . . . prejudicial material is not apparent from responses to . . . more general [*e.g.*, source] questions," *id.* at 156, but questions concerning the sources of exposure are never dispensable.

As the en banc opinion acknowledges, the pretrial publicity was massive. It would in fact be difficult to find a criminal case in which the extent of publicity was so carefully chronicled and the objections to an abbreviated *voir dire* so clearly and fully preserved. The Appendix includes 610 pages of detailed newspaper accounts of the events leading to the trial of these defendants. The en banc opinion is simply not faithful to the record in suggesting that some articles containing favorable material somehow neutralized the adverse publicity. It was devastating. The publicity concerning Governor Blanton and the other defendants in this appeal was not confined to the matters involved in the trial. The articles covered not only the entire range of the defendants' alleged activity but also implicated the defendants in the alleged criminal activities of other well-known citizens of Tennessee, including other mem-

bers of Blanton's family. An objective examination of the compiled record of newspaper publicity reveals that it was overwhelmingly accusatory. For example, an article in the Nashville *Tennessean* appearing April 7, 1981 (two weeks before the jury selection commenced) was entitled: "JAKE BLANTON ADMITS TAKING BID-RIG PAYOFF." App. 264. The opening paragraphs of the article state:

> James C. (Jake) Blanton admitted in federal court yesterday he told a meeting of bid riggers here in 1978 he wanted a $41,000 payoff to buy his girlfriend a house.
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> Blanton, 59, of Tupelo, Miss., also implicated his nephew, Gene Blanton, former Gov. Ray Blanton's brother, in several schemes to rig state highway paving contracts, as Gene looked on impassively.

App. 264. The record reveals in-depth media exploration of charges that Governor Blanton and others were involved in selling pardons during the closing days of his administration. On April 15, 1981, less than one week before the jury selection began, the *Tennessean* in an article headlined "TAYLOR ON TAPE LINKS RAY BLANTON TO CLEMENCY DEALS" described the testimony of Arthur Wayne Baldwin[2] concerning Governor Blanton's involvement in a "clemency-peddling scheme" to sell clemency and commutations to hardened state criminals at amounts said to sell clemency and commutations to hardened state criminals at amounts said to range from $3,000 to $100,000. App. 427. A follow-up article the next day linked Blanton to 30 commutations, App. 425, while elsewhere in the same edition of the *Tennessean* another article highlighted the ongoing trial of Gene Blanton in Memphis for tax fraud. App. 426. A review of earlier articles included in the record reveals the derogatory nature

[2] Baldwin's conviction in Memphis of four counts of a federal indictment charging him with arson and unlawful use of explosives was upheld by a panel of this court in *United States* v. *Baldwin*, 81-5589 (6th Cir. February 16, 1983).

of the clemency-sale stories, particularly those pertaining to the proposed pardon of an allegedly psychotic double murderer. *See, e.g.*, App. 290-92, 293-94, 299, 302-03. The allegations of "influence-peddling," mail fraud, the extortion involving Governor Blanton and co-defendants Hood and Allen, which formed the basis of the instant litigation, are exhaustively chronicled in articles from the Nashville *Tennessean* and Nashville *Banner* as well as other publications.

As an examination of the massive record reveals, a reader of the *Tennessean* or the *Banner* was faced with a highly complex and inflammatory story of allegedly illicit, unethical and criminal activities which either directly involved the defendants or linked them by name and association to others who were responsible. All of this was bound to lead to a substantial probability that prospective jurors, particularly those who read the two Nashville daily newspapers, would be exposed to news of many crimes and activities beyond those directly involved in the trial. A very real possibility existed that jurors would confuse the activities of Governor Ray Blanton with others in Blanton's family who were also being charged or implicated in a wide variety of illicit conduct.

It was the absence of such a record in *United States* v. *Johnson, supra*, which led Judge Celebrezze to uphold the relatively limited *voir dire* there:

> In this case, the requests by defense counsel at trial for further questioning of veniremen related to pretrial publicity generally and not to whether jurors recalled any specific matters. The record of the voir dire contains neither newspaper articles nor any description of other publicity relating to the case. In the absence of a clear foundation for inquiring into juror recollection of particular prejudicial matter, the trial judge was justified in refusing to ask content questions. *See Robinson, supra*, 154 U.S.App.D.C. at 270, 475 F.2d at 381. *Cf. Ham* v. *South Carolina*, 409 U.S. 524, 528 n.4, 93 S.Ct. 848, 35 L.Ed.2d 46 (1974); *United States* v. *Giacalone*, 574 F.2d 328, 334-35 (6th Cir. 1978).

Id. 584 F.2d at 156. Even in *Johnson*, however, inquiry was permitted to determine whether jurors had actually read certain particularly inflammatory articles. The reviewing court therefore observed that "knowledge of juror exposure to them would provide defense counsel with sufficient information to intelligently exercise peremptory challenges, without additional questioning as to what jurors remembered about the reports." *Id.* at 156.

III.

The jury *voir dire* in this case was altogether inadequate to uncover possible bias in the jurors. The precautions taken by the trial judge were simply not responsive to the dangers posed by the selection technique employed. As noted in section I, *supra*, the technique of *voir dire* examination actually encouraged nondisclosure of juror bias and was inherently intimidating, although clearly not intended to be.

It does not take extensive acquaintance with jury trials to reach the conclusion that most jurors perceive themselves as fair-minded, objective individuals. Indeed, most are. It is also a fair observation that many, if not most jurors prefer to remain as inconspicuous as possible during *voir dire*. This is only natural. Jurors find themselves in a strange environment. Even the best efforts of trial judges and attorneys cannot quite dispel the courtroom atmosphere of forbidding formality which naturally inhibits volunteered speech. The *voir dire* here presents a classic case of such reticence on the part of jurors during questioning concerning their personal acquaintance with parties and anticipated witnesses. On a number of occasions there was no response when questions concerning familiarity with witnesses were put to the venire *en masse* and yet when an attorney had knowledge that a particular juror was familiar with a given witness that juror readily admitted such knowledge. Although some jurors did not respond sooner because the juror did not connect the name given with the

person he or she knew, or didn't hear the question when it was originally asked, the failure to respond more often reflected the completely natural reticence of a juror to say anything at all unless directly questioned. Volunteering answers to questions put only generally to the venire *en masse* comes hard for most jurors.

The majority opinion stresses that the trial judge was particularly generous in allowing additional peremptory challenges. This was indeed a salutary precaution given the nature of the case. However, I respectfully submit that the problem was not so much the number of peremptory challenges allowed (and they were not all used) as it was the absence of any meaningful information which might have enabled the defense counsel to exercise those challenges intelligently.

Likewise the extensive questioning of jurors concerning their acquaintance with parties, or witnesses, or law enforcement personnel, or persons in state government fell far short of curing the need for the most important information of all: what did a juror know about the case coming before him? What accurate or inaccurate preconceived notions did he have concerning it? The en banc opinion appears to conclude that if one but asks enough other questions, the inherent risk in not asking the most relevant questions is somehow dissipated. One need only ask why it seemed important to the trial judge that no juror disclose any specific knowledge or preconceived opinion to understand the prejudice of this method. Why should a juror not voluteer information? Obviously the court feared that in so disclosing, the rest of the venire might somehow be contaminated. I respectfully suggest that if that fear was justified, the answer was not to suppress the information altogether. If the dreaded answer would contaminate the entire venire, why would it not also contaminate the juror who entertained such notions irrespective of whether he or she subjectively believed it would?

IV.

The trial judge's refusal to allow the defense to discover what the veniremen had read or heard concerning Blanton not only adversely prejudiced the ability of the court and counsel to weigh challenges for cause, it also had a profoundly debilitating effect upon the intelligent use of peremptory challenges. Even counsel for the government joined the defense in requesting a more explicit *voir dire* on publicity. See section V, *infra, quoting* App. 1531-32.

The en banc decision seeks to excuse the trial judge's error by noting that defendants had access to information supplied by each venireman on an official questionnaire, that defendants were given thirty peremptory challenges, and that guilty verdits must be unanimous.

A glance at the "official questionnaire" reveals that it could provide no information regarding exposure to pretrial publicity other than whether the juror could read, write, and understand English.[3]

As is earlier observed, unlimited peremptory challenges could have been granted, but with no factual basis on which to exercise them intelligently, this additional protection would be futile.

The en banc opinion also indicates that the requirement of a unanimous jury verdict is an antidote for inadequate *voir dire*. However, no single requirement for a fair trial can relieve the court of the responsibility to observe all of the procedures which the cumulative wisdom of the years has found so necessary to a fair trial. The effective use of peremptory challenges has always been considered an essential, independent requirement in Anglo-Saxon jurisprudence.

Peremptory challenges were solidly established in early English law. Blackstone hailed the peremptory challenge as "a provision full of that tenderness and humanity to prisoners,

[3] *See* En banc Op. at 26, *ante*.

for which our English laws are justly famous." 4 *Blackstone's Commentaries* 352 (1822). In *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965),[4] the Supreme Court noted that "the persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Although the Constitution does not require Congress to grant peremptory challenges, the Supreme Court has recognized that the challenge is "'one of the most important of the rights secured to the accused.'" *Swain*, 380 U.S. at 219, *citing*, *Pointer* v. *United States*, 151 U.S. 396, 408 (1894). "[T]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain*, 380 U.S. at 219 (citations omitted); *see also United States* v. *Johnson*, 584 F.2d at 155.

In *Johnson*, Judge Celebrezze observed that "[w]here veniremen have been exposed to prejudicial publicity, the nature and degree of that exposure is certainly a matter of legitimate concern to a defense attorney . . . deciding on peremptory challenges." 584 F.2d at 155. Here, the trial judge completely frustrated the right to exercise peremptory challenges by preventing the defense from acquiring the information it needed to effectively utilize its peremptories. Under *Swain* and *Johnson*, the trial court committed reversible error.

There remains another serious prejudice not addressed by the en banc opinion. Both Governor Blanton and defendant Allen timely moved the court for a change of venue. The trial judge sensibly deferred ruling upon this motion until he was able to determine whether an impartial jury could be selected

[4] In *Swain* v. *Alabama*, 380 U.S. 202, 218 (1965), the Supreme Court noted that peremptory challenges and challenges for cause have "fallen into disuse" in England. One explanation for this is the "greater control" which English courts exercise over pretrial publicity. *Swain*, 380 U.S. at 218 n.24. I fully agree with the majority's concern for the right of the press to report ongoing criminal investigation and trials, especially those involving affairs of public importance. However, concepts of fair trial and free press are not necessarily mutually exclusive. If a more sensitive *voir dire* is necessary to accommodate both interests, in my opinion, the effort is fully justified by the values implicated.

in Nashville. Once the jury was picked, the trial judge denied the motion to change venue, ostensibly because experience had shown that impartial jurors could be found in Nashville. The only difficulty in this procedure was that the method of *voir dire* effectively precluded both counsel and the trial judge from determining whether the jurors were in fact unbiased. The method also effectively deprived our court of any record by which that decision could be reviewed.

V.

The en banc opinion and Judge Kennedy's concurrence seem to infer that the defendants' difficulties in obtaining adequate *voir dire* were of their own making. I respectfully disagree.

The defendants made known their objections to the proposed manner of *voir dire* early and often. Extensive written requests for *voir dire* relating to pretrial publicity were submitted by Blanton, Hood, and Allen. Relevant excerpts from those requests are appended hereto as Attachments A, B & C. The observation in the concurrence that the defendants did not ask for individualized *voir dire* before impanelling the first group of jurors, is in my opinion, inaccurate.

Voir dire commenced on April 20, 1981. On April 14, 1981, Blanton filed a "motion for Right of Counsel to Participate in *Voir Dire* Examination." That motion requested "that counsel be permitted to participate in the *voir dire* examination *outside the presence of other jurors.*" App. 235 (emphasis added). On April 20, 1981, Hood also "move[d] the court to *voir dire* each prospective juror individually." App. 615. Allen moved for individualized *voir dire* of those jurors who stated an opinion.[5]

The en banc opinion and the concurrence do not consider that a broader question than *individualized voir dire* is at issue

[5] *See* Motion Concerning *Voir Dire* or in the Alternative Change of Venue or Severance, docketed April 20, 1981.

here. Counsel strenuously objected to the fact that *no questions* about media exposure were asked of the venire, before the first group of jurors was chosen. Counsel stated:

> MR. WILLIS: Secondly, let me raise this question with the Court. And I think, for the record, I should move the Court orally at this time to ask the Defendant Hood's questions number 39 through 58 previously submitted to the Court, all of which deal with pretrial publicity, on the theory that the information that has been developed from the Jury at this point is inadequate to permit us to intelligently exercise a peremptory challenge.
>
> MR. MCLELLAN, JR.: We would ask, Your Honor, that you ask the Jury – which you have done in general terms – but specifically, if their judgment has been affected by reading articles with the name Blanton in it, members of his family.

App. 1531. Even counsel for the Government requested a more comprehensive *voir dire* on the subject of publicity:

> MS. ARTHUR: I was just going to say that we would join in Mr. Willis' motion as far as additional voir dire on publicity. Your Honor may or may not know about the publicity that took place at the very end of Mr. Blanton's term in office. And I think Mr. Willis pointed that out. We are not just talking about pretrial publicity involving the case. The Government would urge Your Honor to do some more voir dire on publicity.

App. 1531-32. Counsel continued to object to the procedure after the first group of jurors was chosen, stating:

> MR. WILLIS: Your Honor, I don't want to wear my welcome out with Your Honor. But I feel compelled once again to raise the question of a more specific in-depth inquiry into what these jurors have seen and read and heard. And in that context, I cite Your Honor the decision of the Sixth Circuit in the United States versus

> Dellinger, 472 Fed. 2d 340, which Your Honor is probably already well familiar with. We believe that we need to have more of an inquiry than what reveals the basis for a challenge of cause. We believe that we need to have a sufficient in-depth inquiry so that we may intelligently exercise our peremptory challenges.

App. 1574. *See also* App. 1565. Defendants by no means waived their rights to challenge the adequacy of the *voir dire*.

VI.

In stating that the Supreme Court has not established a *per se* rule regarding jury *voir dire*, the en banc opinion implies that the original panel has done so. I respectfully suggest that a careful reader of Judge Gibson's opinion will search in vain for any expression of a *per se* rule. In fact, Judge Gibson emphasized the trial judge's broad discretion. *See* 700 F.2d at 303, 309.

The panel opinion contains no invariable mandate to compel either private or individualized interrogation of jurors or to adopt the "ABA standards," however salutary they may be.[6] Neither does the panel opinion compel the trial judge to yield the *voir dire*, or any part of it, to the trial attorneys.

---

[6] The Standard provides:

> The following standards govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.
>
> (a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.

ABA Standards for a Fair Trial and Free Press, section 3.5 (final draft 1974).

There are probably as many ways of handling *voir dire* as there are judges and trial attorneys. The original panel did not attempt to legislate any one rule and I, for one, would not attempt to, given the chance. Local practices vary with local history and mores. Beyond that, individual circumstances vary with the particular judge and attorneys involved. It is true, on one hand, that trial counsel may be best able to probe and uncover hidden motives which may affect the objectivity of a juror. On the other hand, there always remains the very real risk that the conduct of *voir dire* by counsel, especially in a highly publicized trial, may lead more to harassment than to enlightenment. Most observers would, I believe, admit that in such a trial the judge must exercise particularly close control to avoid potential abuse. The panel opinion never sought to spell out exactly how the trial judge must exercise that control, however:

> [W]e agree with the implication in *Johnson* that the voir dire should provide some surface information so the parties can use their peremptory challenges in an intelligent or purposeful manner.
>
> In the instant case, where there was substantial, even massive pretrial publicity, the voir dire should have been extensive enough to allow defendants to learn which veniremen were most exposed to publicity, from what sources that exposure came, and who held opinions. That information would have helped defendants detect suspected biases and use their peremptory challenges accordingly, helping to insure an impartial jury. The defendants had no information which would cause them to suspect biases which either were not strong enough for disqualification for cause or were not evident enough for the court to believe disqualification was in order. The lack of such information was an impairment of the peremptory challenge right, and would of itself require reversal.

We are not unmindful of the trial court's finding that

> the "jury selected is as fair and impartial a jury as could be obtained" and that a trial judge must be accorded considerable latitude and allowed a range of flexibility in impaneling a petit jury. Also we note that an appellate court will not interfere with the jury selection process absent an abuse of discretion. *Blount*, 479 F.2d at 651; *United States* v. *Owens*, 415 F.2d 1308, 1315 (6th Cir. 1969), *cert. denied*, 397 U.S. 997, 90 S.Ct. 1138, 25 L.Ed. 2d 406 (1970); *Silverthorne*, 400 F.2d at 638. Although the trial court's finding might be correct, there is no way on this record to probe that finding since the record is silent on the extent of the veniremen's exposure to the pretrial publicity and the depth and extent of their personal reactions to the massive publicity. We conclude as a matter of fairness that the court should have probed into the effect of the publicity upon the prospective jurors, both for challenges for cause and for the exercise of peremptory challenges.

700 F.2d at 309-10. In sum, Judge Gibson's opinion left available to the trial court on remand the widest possible range of choices consistent with its responsibility to insure the defendants a fair and impartial jury.

The en banc opinion rightly observes that it is a "major problem" to choose a jury without exposing or reexposing potential jurors to prejudicial information. The opinion indicates, however, that the solution to the problem is "deliberately to avoid" such exposure. En banc opinion at 9-10, *ante*. As a practical mater, the opinion implies that the only solution is to avoid the issue altogether, perhaps in hope that the problem will go away. Alternatively, it assumes that a trial judge is powerless to protect the defendant from prejudicial publicity where the judge "comes on the scene *after* the media exposure." *Id.* (emphasis in original).

There are alternatives to the excessive and unnecessary limitations imposed upon the *voir dire* below. Trial judges in their discretion have used several *voir dire* methods to protect the

rights of highly publicized defendants such as Governor Blanton. The most obvious method is individualized *voir dire* outside the presence of other jurors, as advised by section 3.5 the ABA Standards. *See* note 6, *supra*. This method was used in the trial of Watergate defendants H. R. Haldeman, John Erlichman and John Mitchell. *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). Following general questioning of the veniremen in groups, the trial judge there questioned each juror individually.

> Before the publicity was mentioned the venireman was asked if he believed that any defendant was probably guilty. He was then asked if he had heard of the case and, if so, whether anything he had heard or read about the case stood out in his mind. The next questions asked whether the venireman had seen the defendants or their lawyers in the newspapers or on television and whether he remembered anything in particular about them. Subsequently the court determined which newspapers and magazines the venireman read and with what degree of regularity; which television news programs he watched; whether he had followed the legislative inquiries related to Watergate or read any of the books or other lengthy pieces concerning Watergate, including the presidential tape transcripts; whether he had followed Watergate closely or casually; and whether (and how recently) he had discussed the case.
>
> After determining the veniremen's degree of interest in and exposure to the case, the court inquired whether he had formed or expressed an opinion of the guilt or innocence of any defendant.

559 F.2d at 65-66.

The trial judge used a similar method in the trial of Lieutenant William Calley on murder charges following the "My Lai massacre." The Fifth Circuit described the questioning:

> The second reason to credit the court members' state-

> ments is that they were the product of searching and sensitivity conducted voir dire. The military judge conducted the voir dire in accordance with the recommendations of the American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press 3.4(a) (Approved Draft, 1968). The examination of each court member was held out of the presence of other prospective jurors. Judge Kennedy, the military judge, himself inquired into the prospective court members' exposure to publicity and ability to render a fair and impartial verdict. But more importantly, both defense counsel and the prosecution were allowed almost unlimited freedom to inquire into the court members' attitudes, perceptions, backgrounds and the nature and extent of their exposure to pretrial publicity.

Calley v. *Callaway*, 519 F.2d 184, 208-09 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *See also United States* v. *Ehrlichman*, 546 F.2d 910 (D.C. Cir.), *cert. denied*, 429 U.S. 1120 (1977) (burglary of psychiatrist's files regarding Daniel Ellsberg, who released the "Pentagon Papers"); *People* v. *Manson*, 61 Cal. App.3d 102, 132 Cal. Rptr. 265 (1976), *cert. denuied*, 430 U.S. 986 (1977) ("Manson family" Tate and LaBianca murder trial); *People* v. *Collins*, 43 Mich.App. 259, 204 N.W.2d 290 (1973), *lv. to appeal denied*, 391 Mich. 798, *cert. denied*, 419 U.S. 866 (1974) (John Norman Collins convicted of one of several "Ann Arbor" murders).

Most observers would agree that use of ABA Standards would more likely produce error-free trials. I sense in my colleagues, however, a countervailing fear that at best the panel opinion would both hog-tie the trial judge and unduly protract the jury selection process and subject the jurors to embarrassment and harassment.

> It is for just such reasons that Rule 24 grants the district courts such wide latitude in these matters. It leaves to their sound discretion the duty to forge a reasonable ac-

> commodation between the interests in obtaining an unbiased jury, and in doing so as expeditiously as possible.

United States v. *Dansker*, 537 F.2d 40, 56 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

In striking a balance between these competing concerns, trial judges have used several methods of *voir dire*. There is no mandate to interrogate each potential juror privately. For example, when Gordon Liddy was tried for his role in the Watergate incident, the D.C. Circuit accepted a *voir dire* procedure whereby the judge asked general questions of the entire jury and individually questioned only those who had an opinion about the case, or who recalled details of the case. Only the eight jurors who acknowledged they were exposed to publicity were individually questioned. *United States* v. *Liddy*, 509 F.2d 428, 436-37 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911 (1975).[7] *Accord*, *United States* v. *Bryant*, 471 F.2d 1040 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1112 (1973); *United States* v. *Mazzei*, 390 F.Supp. 1098 (W.D. Penn.), *mod. on other grounds*, 521 F.2d 639 (3d Cir.), *cert. denied*, 423 U.S. 1014 (1975).

United States v. *Addonizio*, 451 F.2d 49 (3d Cir. 1972), *cert. denied sub nom. Biancone* v. *United States*, 405 U.S. 936 (1972), illustrates that a judge in his discretion may conceive of several means of questioning the jury that protect the rights of the defendant while serving the interests of efficiency. In *Addonizio*, several city officials were prosecuted for their roles in a "kickback" scheme on city projects. The trial judge did not conduct individualized *voir dire*.

> The voir dire examination of prospective jurors was conducted exclusively by the trial judge. Counsel were not permitted to participate, although they submitted

[7] Although the court found that such *voir dire* is consistent with the ABA Standard, it is not. The ABA standard requires individualized *voir dire* of all potential jurors. *See* note 6, *supra*.

> proposed questions, many of which were asked by the court. The preponderance of the voir dire was devoted to determining the extent of each prospective juror's exposure to pretrial publicity and the effect of that exposure upon his ability to judge the defendants impartiality. Invariably, any prospective juror who indicated he knew something about the case was questioned further as to the nature and extent of his exposure, while at the same time being admonished not to go into the *substance* of what he had read. Typically the inquiry centered around the particular newspapers in which the prospective juror had seen case-related stories and whether he had read entire articles or only portions thereof (or, in some instances, merely headlines). Prospective jurors were then questioned at some length as to whether they had formed any opinion as to the guilt or innocence of the defendants and whether they could judge the defendants impartially despite some exposure to pretrial publicity.
>
> • • • •
>
> Prospective jurors who had formed an opinion as to guilt or innocence of any of the defendants were excused *sua sponte* by the court. Prospective jurors who had discussed the case were similarly excused, regardless of the nature or extent of the discussion or their own expression of impartiality. The court dismissed on its own motion each prospective juror who indicated extensive exposure to pretrial publicity, *without regard* to protestations of impartiality.

451 F.2d at 65-67 (emphasis in original).

Another alternative was available here. Blanton submitted a written questionnaire to be completed by the potential jurors. This process could serve as an effective way to screen jurors and to determine which should be questioned further without asking any questions before the entire venire.

In conclusion, there are many alternatives. Judge Gibson's opinion does not embrace a *per se* rule.

CONCLUSION

The en banc opinion makes the following observations concerning these defendants:

> Governor Blanton ran for and was elected to the highest office in Tennessee state government. This fact guaranteed that for the term of office to which he was elected, he would be constantly in the limelight and every act and word would be subject to comment. The other two defendants accepted positions in state government in close proximity to its head. Under the First Amendment, neither the defendants nor any court in the United States could (or should) have prevented the public media comment which ensued.

En banc op. at 9.[8]

The issue here is not whether a famous or notorious person is entitled to a greater measure of deference due to his exalted station in life; he is not. However, a greater degree of care may nonetheless be necessary to assure the same fairness that is ordinarily enjoyed by any private citizen.

I respectfully suggest that my colleagues in the majority may not fully appreciate the impact which their opinion is bound to have upon the jury selection process. In a very real sense, the majority has reverted to a system of which Blackstone reports the English had become "heartily tired" by the time of Queen Anne. 3 *Blackstone's Commentaries* 360 (1822).[9] Jurists from

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[8] See note 4, *supra*, for comment on First Amendment values.

[9] Blackstone reports that under "ancient law, the jury was to come *de vicineto*, from the neighbourhood of the vill or place where the cause of action was laid in the declaration." 3 *Blackstone's Commentaries* 359 (1822). The rationale for this selection system was that jurors from the parties' neighborhood would "know beforehand the characters of the parties and witnesses, and therefore they better knew what credit to give to the facts alleged in evidence." *Id.* Even in Blackstone's time, however, it was apparent that jurors with prior knowledge of the parties often could not set aside their prejudices:

> But this convenience [i.e., prior knowledge] was overbalanced by another very natural and almost unavoidable inconvenience;

Chief Justice John Marshall, to District Judge John J. Sirica, who have struggled with the problem of pretrial publicity would be surprised to learn that the law no longer requires courts to pursue the often tedious task of determining which prospective jurors may entertain "light impressions which may be fairly supposed to yield to the testimony that may be offered," and which jurors entertain "those strong and deep impressions which will close the mind against the testimony which may be offered in opposition to them, which will combat the testimony, and resist its force . . . ." *United States* v. *Burr*, 25 Fed. Cas. 49, 50 (No. 14,692g) (C.C. Va. 1807). Now, even in the most notorious cases, the parties and the court alike will be left to assess juror bias solely upon the basis of silence in the face of general questions, generally put, entirely without regard to the source or nature of the pretrial publicity or to the extent of individual exposure or reaction to it. Such a procedure no doubt will speed up trials, as it did here. The price, however, in terms of traditional American notions of fairness, is too high.

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that jurors, coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of right. And this our law was so sensible of, that it for a long time has been gradually relinquishing the practice.

Id. at 359-60. In the reign of George II, the *de vicineto* system was completely abolished, in favor of the *de corpore comitatus* system, by which jurors were selected "from the body of the county at large." *Id.* Thus, we have come almost full circle from a system preferring jurors with prior knowledge, to a system seeking to exclude such persons, to the present system under which the defense is barred from determining whether prospective jurors have prior knowledge or not.

ATTACHMENT A

Defendant Blanton's requested *voir dire* questionaire contained the following inquiries relating to pretrial publicity:

40a. Do you read The Nashville Tennessean ( ) Yes ( ) No

40b. Do you subscribe? ( ) Yes ( ) No ( ) Sunday subscription only

40c. How often do you read it? ( ) Once a week ( ) 2-3 times a week ( ) 4 or more times a week ( ) Every day ( ) Only when something special is reported ( ) Sunday only

41a. Do you read The Nashville Banner? ( ) Yes ( ) No

41b. Do you subscribe? ( ) Yes ( ) No ( )Sunday subscription only

41c. How often do you read it? ( ) Once a week ( ) 2-3 times a week ( ) 4 or more times a week ( ) Every day ( ) Only when something special is reported ( ) Sunday only

42. What other Local/State Newspapers do you read?
.....

43. What Out-of-Town Newspapers do you read? .....
.....

44. What are your 3 favorite General TV Programs?
1. .....
2. .....
3. .....

45a. What TV News Programs do you watch? .....
.....

45b. How many times a week do you watch TV News?
.....

46. What is your favorite Radio Station? .....

47. Please list what Magazines and Periodicals you read:
. . . . . .
. . . . . .

• • •

67. Have you heard the name Blanton? ( ) Yes ( ) No

68. Have you heard the name Blanton in connection with State Government?
( ) Yes ( ) No

69. Have you read anything in the newspapers or heard anything on the radio or television about Ray Blanton?
( ) Yes ( ) No

70. Was what you heard: Good ( ) Bad ( )

71. Do you feel that Ray Blanton is Corrupt?
( ) Yes ( ) No

72. Since Ray Blanton has been accused of a crime, do you believe that he is guilty?
( ) Yes ( ) No

73. Has the publicity which Ray Blanton has received and the resulting public notoriety affected your opinion of Governor Ray Blanton?
( ) Yes ( ) No

74. Can you separate Governor Ray Blanton from his co-defendants Mr. Hood and Mr. Allen or from other people about whom you may have read who were employed by Governor Blanton during his administration?
( ) Yes ( ) No

App. 241-42, 243. None of the above questions was asked.

ATTACHMENT B

Defendant Hood submitted the following proposed questions for *voir dire* concerning pretrial publicity:

40. Have you talked with anyone who claimed to know any of the facts supposedly involved in this case?

41. Do you regularly read *The Tennessean*?

42. Do you regularly read *The Nashville Banner*?

43. Do you regularly read *The Columbia Herald*?

44. Do you regularly read *The Clarksville Leaf Chronicle*?

45. Do you regularly watch the daily news on Nashville television stations?

46. Which station do you watch with the greatest frequency?

47. Do you regularly listen to radio newscasts?

48. Have you read any newspaper articles that referred to Clyde Edward Hood, Jr.?

49. In what newspaper did you read these articles?

50. Did these articles purport to give facts that you now believe to be related to the matter currently going to trial?

51. Do you remember any of the details of these articles?

52. Have you seen any television newscasts that referred to Clyde Edward Hood, Jr.?

53. Did these newscasts purport to give details that you now believe to be related to the matter currently going to trial?

54. Do you now remember what those details were?

55. Have you heard any radio newscasts that referred to Clyde Edward Hood, Jr.?

56. Did these newscasts purport to give details that you now believe to be related to the matter currently going to trial?

App. 641-42. None of the above questions was asked.

ATTACHMENT C

Defendant Allen submitted the following proposed questions for *voir dire* concerning pretrial publicity:

14. Have you received any knowledge or information about the case by way of the newspapers, radio, television, talking with acquaintances, or otherwise?

15. Have you received any knowledge or information about any other criminal case involving State officials, employees, or members of the family of any defendant, by way of newspapers, radio, television, talking with acquaintances, or otherwise?

Neither of the above questions was asked.

KEITH, Circuit Judge, dissenting. I am delighted to join in Judge Engel's excellent, thorough and comprehensive opinion. I am, however, compelled to write separately, because as a member of the original panel in this case, I am totally convinced that we were correct in reaching the conclusion that the defendants were denied a fair and impartial trial, as guaranteed them by the Sixth Amendment of the United States Constitution. This denial, in my judgment, was based on the inadequate *voir dire* examination.

This case is a direct appeal from a federal criminal trial. We have a duty as an appellate court to exercise supervisory authority over the conduct of such trials. If this case involved *habeas corpus* review of a state court conviction, we could only overturn the conviction if the error rose to the level of constitutional dimensions. However, in this case, our scope of review is not so limited. It is broad, it should be broad. We have an obligation and indeed a duty to ensure that federal criminal trials are fairly conducted. Judge Gibson's[1] superb opinion for the panel was faithful to this duty.

Words fail to do justice to the amount of publicity this case has received – pre-and post-judgment. At issue in this case is the alleged conduct of a former governor, the governor's campaign manager and a former special assistant to the governor. A federal indictment of a former governor is by itself an extraordinarily newsworthy item. This is particularly true because the alleged federal criminal violations occurred during the governorship. Moreover, defendant Leonard Ray Blanton was no ordinary governor. His successor, Governor Lamar Alexander, was sworn in several days ahead of schedule, allegedly to prevent Governor Blanton from pardoning or commuting the sentences of numerous state prisoners. The alleged corruption of the Blanton administration has been and

[1] Judge Gibson was formerly a U.S. District Judge and also Chief Judge of the Eighth Circuit.

will be the subject of books, articles and historical research, and perhaps a movie.

We have no control over the verdict of public opinion or the verdict of history. This case, however, concerns something that is more important and fundamental – a man's liberty and his right to a fair trial. Under our system of justice, everyone, including an allegedly corrupt ex-governor, is entitled to a fair trial before a fair and impartial jury of his peers – no more and no less. The record in this case as to *voir dire*, contains none of the assurances which would guarantee that the jury was fair and impartial. The trial judge did not ask the prospective jury panel what they had heard about the case, the defendants or the source of such information. The judge did not ask the venireman whether they had formed an opinion about the case nor did he probe the nature and extent of that opinion. The trial judge simply asked the prospective jurors whether they could put aside any opinion or prejudice they may have, and decide the case on the evidence before them. This was woefully inadequate considering that the case concerned: (1) an allegedly notorious former governor; (2) a trial which was located in the state capital and the subject of massive media coverage; and (3) alleged offenses that occurred while the ex-governor was in office.

In my experience, many jurors, consciously or subconsciously, tend to believe that a defendant, if indicted, is guilty. After all, they say, the government would not bother investing the time, energy and effort to investigate and indict a person unless there was good reason to believe that person was guilty. In the ordinary case, this belief is corrected by argument of the attorneys and instructions from the judge. A man is presumed innocent in our society, under our laws, until he is proven guilty beyond a reasonable doubt. In a case such as this, however, there has been a drum beat of intensive publicity for two years prior to trial. Indeed, the publicity continues. These extraordinary circumstances, at

a minimum, required careful, even individual questioning of prospective jurors. No literate resident in Nashville, or for that matter, in the entire State of Tennessee, could fail to have at least an impression about former Governer Blanton. Therefore, only the most careful, indeed, individual questioning could ensure the selection of an impartial jury.

In the federal system, a trial judge has broad authority over *voir dire*. A federal trial judge can either conduct *voir dire* himself, or allow the attorneys to question the jurors, or in the alternative they can both share the conducting of the *voir dire*. In practice, most federal trial judges conduct *voir dire* themselves. It is rare that attorneys are permitted to question the jurors. This is in contrast to some state systems where attorneys routinely conduct the *voir dire* of the jury.

In this case, the trial judge followed the federal custom – he conducted the *voir dire* entirely himself. The Judge exercised his discretion and did not permit the attorneys to question the jury panel. Because the trial judge assumed the duty of conducting *voir dire*, it was particularly important that he carefully probe any possible source of bias. It is distressing that a majority of the *en banc* court has approved the bare-bones questions that occurred in this highly publicized case.

I find particularly distressing the majority's statement concerning publicity. This statement intimates that the defendants created some of the publicity by running for public office or associating with a man in high public office. The majority suggests that the defendants deserved what they got, or that this in some way, justified the inadequate *voir dire*. Such a suggestion is indeed, incredible. Does the majority actually believe that a man stands before the bar of justice in a lesser light because he was an elected public official? The reason why a case is highly publicized should be irrelevant. What matters are the steps taken to ensure a defendant has a fair trial – regardless of the source of rea-

sons for publicity. Whether a man ran for high public office should have no effect on his basic constitutional rights or on this Court's review of his conviction.

I am, frankly, at a loss to explain why the *en banc* court has approved this *voir dire*. There are no cases on point which approve questioning so limited as what was permitted in this case. The majority opinion establishes an unwise and dangerous precedent which tampers with basic rights. More importantly, we have no way of knowing, based on the record of the *voir dire* in this case whether the defendant's convictions may well have been influenced and procured not by what took place at trial or during the course of the trial, but by outside influences. We should not tolerate such a shotgun and cavalier result. The defendants are entitled to a new trial. I respectfully dissent from the majority's insistence on not giving them that new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD RAY BLANTON, PETITIONER

v.

UNITED STATES OF AMERICA

CLYDE EDWARD HOOD JR. AND JAMES M. ALLEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge abused his discretion or denied petitioners a fair trial by the manner in which he conducted the jury voir dire regarding pretrial publicity.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-858

LEONARD RAY BLANTON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-860

CLYDE EDWARD HOOD JR. AND JAMES M. ALLEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. 4a-32a)[1] is reported at 700 F.2d 298. The opinion of the en banc court (Pet. App. 33a-96a) is reported at 719 F.2d 815.

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[1] "Pet. App." refers to the petitioner's appendix in No. 83-858.

JURISDICTION

The judgment of the en banc court was entered on September 28, 1983. The petition for a writ of certiorari in No. 83-858 was filed on November 23, 1983. The petition in No. 83-860 was filed on November 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Tennessee, each petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. Blanton was also convicted on three additional mail fraud counts, and on one count of interfering with commerce by threats or violence, in violation of the Hobbs Act, 18 U.S.C. 1951. Hood was acquitted on three mail fraud counts and on the Hobbs Act count. The district court dismissed three mail fraud counts and the Hobbs Act count as to Allen. Blanton was sentenced to three years' imprisonment and fined $11,000. Allen and Hood were sentenced to terms of two years' and 18 months' imprisonment respectively, and each was fined $14,000. The en banc court of appeals affirmed (Pet. App. 33a-96a).

2. The evidence at trial showed that during Blanton's four-year tenure as Governor of Tennessee (1975 to 1979) he, together with Allen and Hood, who were on Blanton's staff, conspired to procure state liquor licenses for Blanton's friends and others in exchange for a share in the liquor stores' profits. In furtherance of the scheme Blanton appointed two of the three commissioners of the Tennessee Alcoholic Beverage Commission (ABC), who in turn selected

Blanton allies as director and assistant director of the ABC. Allen was put in charge of selecting liquor licensees even though he had no position at the ABC; he also helped arrange for the ABC chairman to acquire an illegal interest in a liquor store and attempted to acquire a concealed interest in a liquor store for himself (Pet. App. 35a-36a). Hood advised the ABC director who Blanton's friends were so that they would receive licenses; Hood also received a share of the profits of some of the newly licensed stores (*ibid.*).

The principal evidence against petitioners was the videotaped deposition of Jack Ham, a contributor to Blanton's campaign.[2] Blanton had arranged for a liquor license for Ham and approved a transfer of Ham's liquor license to a more lucrative location in exchange for a 20% share of Ham's profits. The kickback was paid in the form of a purchase of $23,000 in worthless oil stock by Ham from Blanton. Allen and Hood intervened with the ABC to secure the transfer of Ham's license, and Hood suggested that Ham pay Blanton's share of the profits by buying the worthless oil stock (Pet. App. 35a-36a).

3. Petitioners' trial was preceded by considerable publicity. The record contains more than 240 articles from Nashville newspapers concerning this prosecution and other activities of petitioners. 75 articles which appeared while Blanton was governor

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[2] Ham's trial testimony was introduced in the form of a videotaped deposition pursuant to Rule 15 of the Federal Rules of Criminal Procedure because Ham was in poor health. Ham had agreed to testify in exchange for immunity from federal prosecution and civil tax liability, and the ABC agreed not to revoke his liquor license on the basis of his truthful testimony (Pet. App. 38a).

concerned patronage in his administration and the improper pardon of state prisoners. There were 22 articles about Ham's deposition, the last of which appeared four months before the trial. Much of the original indictment was published verbatim. 160 articles were published within six months of the trial concerning this prosecution, the prosecution of Blanton's brother and of former Blanton aides, and improper pardons of prisoners. In addition, there was an offer of proof concerning the testimony of news directors of three Nashville television stations about the pretrial publicity (Pet. App. 38a-39a).

The nature of the voir dire conducted by the trial judge[3] is described by the en banc court (Pet. App. 40a-41a) (quoting *id.* at 10a-11a):

> The trial court conducted the voir dire *en masse*. It seated a group of veniremen in the jury box and directed questions at that group, but instructed the rest of the veniremen in the courtroom to listen to and pay attention to the questions as the questions would apply equally to all those selected. During the course of the voir dire the trial court pointed out that the case had been the subject of considerable media attention. It commented that it was sure that all the veniremen had heard about the case, and that some of them may have formed a tentative opinion concerning the probable guilt or innocence of the defendants. The court then said to the veniremen:

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[3] All of the district judges in the Middle District of Tennessee disqualified themselves. The voir dire was conducted by Judge John W. Peck, Senior Judge of the Sixth Circuit Court of Appeals, who excused himself after the first day of testimony at trial because of the sudden illness and subsequent death of his wife (Pet. App. 46a n.2).

> [T]he test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?

One juror was excused because she indicated she could not be impartial. As new veniremen entered the jury box to replace the ones who were excused for whatever reason, the trial court would ask them essentially the same question on pretrial publicity. It usually said it wanted to "particularly emphasize" the point. Out of ninety-two veniremen examined, a total of thirteen were excused because they indicated they had an opinion or prejudice they could not put aside. Of these thirteen, four linked their prejudice to pretrial publicity. Seven of these thirteen were excused when they said they had an opinion, without the court inquiring into the nature or strength of the opinion or whether it could be put aside. Twenty-nine other veniremen were excused for cause for other reasons and the parties excused twenty-eight others with their peremptory challenges.

4. The panel of the court of appeals reversed petitioners' convictions. It held that, in light of the pretrial publicity, the trial court's failure to question prospective jurors individually and its reliance on the veniremen's assurances of impartiality was not adequate to determine which of the jurors should have been excused for cause, and did not provide defense counsel with sufficient information to exercise their peremptory challenges intelligently (Pet. App. 10a-24a).

The court thereafter granted rehearing en banc and affirmed petitioners' convictions (Pet. App. 33a-96a). The en banc court observed (*id.* at 41a-42a) that, in forgoing individual questioning of veniremen, the trial judge "acted on the assumption that all potential jurors in this case had been subjected to some portion of the massive media coverage concerning [petitioners.]" Thus one of the trial court's "major problems was how to choose a jury without having all potential jurors repeatedly exposed or reexposed to adverse media opinion before the trial even started." The en banc court stated that, although the trial judge "probably" did not use the "best procedure possible" for selecting a jury—since some questioning of individual jurors in chambers or at the bench might have been effectively employed—the judge's conduct of the voir dire did not violate any per se rule established by this Court and was within the trial court's discretion (Pet. App. 40a, 45a-46a, 65a). The court concluded that the procedures adopted by the trial judge, which included "1) extensive questioning concerning prior media impact and juror associations, coupled with many dismissals based on even hints of possible prejudice, 2) very substantial increases in the number of peremptory challenges available to each defendant (30 in all), and 3) reliance on defendants' use of detailed questionnaires concerning all potential jurors coupled with sensitive responses by the court to any of defendants' challenges arising from such use," were "both fair and effective" and resulted in "an impartial jury" (*id.* at 50a, 65a).[4]

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[4] Judge Kennedy, who joined the court's opinion, also wrote a brief separate concurrence saying that petitioners had waived their objections to the conduct of the voir dire (Pet. App. 66a).

Judge Engel, a member of the original panel, joined by Judges Martin, Jones, and Keith, dissented.[5] He would have reversed the convictions in the exercise of the court's supervisory power (Pet. App. 68a), believing that the trial court's failure to question the jurors individually about "the sources and intensity of their exposure to pretrial publicity" "adversely prejudiced the ability of the court and counsel to weigh challenges for cause," and had a "profoundly debilitating effect upon the intelligent use of peremptory challenges" (Pet. App. 71a, 76a).

ARGUMENT

Petitioners contend (83-858 Pet. 9-22; 83-860 Pet. 10-19) that the trial court's failure to ask individual jurors about their exposure to pretrial publicity, and to inquire whether they held an opinion about the case, impaired their right to an impartial jury. They argue that the en banc court's contrary conclusion conflicts with decisions of this Court and of other courts of appeals. Petitioners also contend (83-858 Pet. 22-25; 83-860 Pet. 15) that the trial court's action deprived them of the right to exercise their peremptory challenges. These contentions are without merit.

1. It is axiomatic that a trial judge has broad discretion in conducting the voir dire. Rule 24(a) (Fed. R. Crim. P.) specifically affirms the breadth

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[5] Judge Keith (like Judge Engel, a member of the original panel) also wrote a separate dissent, expressing the view that the conduct of the voir dire here violated the Sixth Amendment right to a "fair and impartial trial" (Pet. App. 93a).

of this discretion.[6] This Court has emphasized the same point:

> [T]he adequacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. See *Ristaino* v. *Ross*, 424 U.S. 589, 595 (1976), quoting *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting). In neither instance can an appellate court easily second-guess the conclusions of the decisionmaker who heard and observed the witnesses.
>
> Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*. In *Aldridge* v. *United States*, 283 U.S. 308 (1931), the Court recognized the broad role of the trial court: "[T]he questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked." *Id.*, at 310. See also *Ham* v. *South Carolina*, 409 U.S.

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[6] Rule 24(a) provides (emphasis added):

> The court *may permit* the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors *or may itself conduct the examination*. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry *as it deems proper* or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys *as it deems proper*.

524, 528 (1973) (recognizing "the traditionally broad discretion accorded to the trial judge in conducting *voir dire* . . .").

Rosales-Lopez v. *United States*, 451 U.S. 182, 188-189 (1981).

The principal objective of the voir dire is to preserve the defendant's right to an impartial jury. But that right does not entitle the accused to jurors who are "totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication * * * [t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961).

a. The adequacy of the voir dire in this case is best shown by a review of the record. At the outset, the trial court told the venire that the "only purpose in undertaking this entire portion of the trial is to get the fairest and most impartial jury that it is possible to obtain" (Tr. 35), and it emphasized that in "fairness and honesty to the parties" the jurors should have "no reluctance whatever" to indicate any doubts they might have about their impartiality, so that they could "be excused from any further duties in the matter" (Tr. 36). To discourage reticence in disclosing bias, the court instructed the veniremen that there was nothing improper about not being able to be a fair and impartial juror in any particular case; the court repeated that instruction throughout the course of the voir dire (Tr. 35, 94, 111, 184-185).

After examining the venire about potential sources of bias unrelated to pretrial publicity,[7] the court stated (Tr. 56):

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[7] During the course of the voir dire the judge questioned the jurors about: whether any juror, or close relative of the juror, knew any of the defendants or members of the defendants' families (Tr. 38-50, 186-192); whether any juror, or close relative of the juror, contributed time, money, or support to Blanton or his opponents in any of his campaigns (Tr. 39-50, 186-192); whether any juror, or close relative of the juror, worked as a state employee while Blanton was governor (Tr. 39-50, 186-192); whether any juror had personal or professional contact with any of the attorneys involved in the trial (Tr. 50-54, 192-193); whether there was anything about the nature of the crimes charged that would make it difficult for any juror to be fair and impartial (Tr. 54-56, 194-195); whether any juror, or close relative of the juror, had been employed as a peace officer (Tr. 59-61, 131, 189-191); whether any juror could not accept the law as stated by the court in its charge to the jury (Tr. 61-62, 198-199); whether any juror could not accord each defendant the presumption of innocence (Tr. 62-63, 199-200); whether any juror was familiar with any of the prospective witnesses in the case (the court read the list of 150 witnesses to the jurors) (Tr. 71-73, 79-82, 130, 200-203, 205-212); whether any juror opposed the granting of immunity to witnesses (Tr. 73-78, 130-131, 203-205); whether any juror, or close relative of the juror, knew the government's case agent (Tr. 78-79, 193-194); whether any juror had any personal beliefs about alcoholic beverages that would influence his judgment (Tr. 84-87, 130, 156, 213-214); whether the length of the trial would impose any undue hardship on any juror (Tr. 91-94, 219-220); whether any juror knew of any other reason he could not be fair and impartial (Tr. 94, 214-215); whether any juror would have any problem deciding each defendant's guilt or innocence based on the evidence presented at trial (Tr. 94-95); whether any juror, or close relative of the juror, was employed by the City of Nashville (Tr. 101-103); and whether any juror would be unable to consider the charges against each defendant separately, even in light of the pretrial publicity about Blanton (Tr. 106-108).

> In the same general context, ladies and gentlemen, I recognize that partially because of the fact that these defendants held such offices, this entire matter has been the subject of attention of the news media. I am sure that all of you have at some time read something about this case in the newspaper, have heard something concerning it on the radio at some time, or have even seen or heard reference to it on television at some time.
>
> Similarly, it is entirely likely that some of you may have formed some tentative opinion concerning the probable guilt or innocence of some of the persons involved, including these defendants. However, the test to be applied in determining your qualifications to sit as jurors is not whether you have heard something about the case from the news media or whether you have formed any kind of a tentative opinion based on such reports. Rather—and I put this in the form of a question—the test is, will you be able to put from your minds whatever you may have seen and heard, and any opinion which you may have tentatively reached, and then to decide this case solely on the facts as you determine them to be, on the sole basis of the evidence which will be adduced in this trial after application of the appropriate law?

In varying language, the court repeated this question at least 19 times, addressing it to individual jurors and to the entire venire and, in most instances, stressing the importance of the matter (Tr. 56-59, 104-105, 106-108, 127, 129-130, 149-150, 153-154, 158-159, 167, 172-173, 177-178, 195-198, 225-226, 234-235, 239, 247, 257-258, 269, 272-273). At one point, after the prosecutor joined a defense motion for additional voir dire focusing upon news accounts about Blanton's aides selling pardons to state prison-

ers, the court addressed the venire as follows (Tr. 104-105):

> Ladies and gentlemen, I have talked a lot about pretrial publicity that has occurred in connection with this case, the fact that you probably have read, heard things about the case. I have not discussed with you the possibility that you may have been familiar with some of the publicity that surrounded Mr. Blanton at the end of his term of office as governor. It seems probable if you were living in this State and area at this time that you read and saw and heard something about the circumstances.
>
> Do any of you have recollection of any facts or circumstances which would cause you either to be inclined to hold that against Mr. Blanton, or on the other hand, to feel that he had been unfairly dealt with and should have been vindicated? We are going back a fair period of time.
>
> But I ask you carefully to search your memories and your consciences on that point. And I ask you as a follow-up to that, does any of you remember anything concerning the circumstance under which Mr. Blanton left the governor's office which would in any way affect your judgment in this case or render you incapable of being completely fair and impartial concerning him and his part in this case?

Moreover, as the en banc court observed (Pet. App. 42a), "the *voir dire* record * * * indicates that [the court] was sensitive to every suggestion of prejudice" and freely used his power to excuse for cause, exercising it 42 times. (In fact, considering individuals subjected to peremptory challenge, "70 out of a total of 92 veniremen were excused" (Pet. App. 41a)). The court promptly excused *every* juror who indicated

that he or she had formed an opinion about the case, without even inquiring into the strength of the opinion or whether it could be put aside. The following excerpts from the record illustrate the court's sensitivity to the slightest suggestion of bias attributable to pretrial publicity:

> THE COURT: I take it from your silence that none of you feel that he or she has been prejudiced by what you may have heard or seen. Yes, ma'am?
>
> JUROR NO. 1 (SHEILA GIBSON): I have been sitting here listening to you. And I am not sure that I would be impartial. I do have somewhat of an idea, from the things I have read and heard.
>
> THE COURT: Thank you very much. You may be excused [Tr. 57].
>
> * * * * *
>
> THE COURT: What is your name, sir?
>
> JUROR NO. 10 (LARRY G. WILLIAMS): Williams.
>
> THE COURT: Have you heard all the questions that have been asked here this morning and afternoon?
>
> MR. WILLIAMS: Yes, sir.
>
> THE COURT: Has anything that's been asked or said indicate to you any reason why you should not sit as a juror here?
>
> MR. WILLIAMS: Yes, sir. You mentioned the media. And the newspaper. That.
>
> THE COURT: You mean you have read them, and you have formed a conclusion?
>
> MR. WILLIAMS: Yes, sir.
>
> THE COURT: Very well, we appreciate your frankness. You may be excused [Tr. 146].
>
> * * * * *
>
> THE COURT: Albright. You have heard all these questions and statements here today?

MR. ALBRIGHT. Yes, sir.

THE COURT: Have any of them suggested to you any reason that you perhaps should not serve as a juror?

MR. ALBRIGHT: Well, sir, Your Honor, the only thing eating on me, before I realized that I would ever have the privilege to serve on this Jury, I made an opinion—I expressed that opinion to some of my friends.

THE COURT: Well, let's don't express it again.

MR. ALBRIGHT: I'm not going to express it.

THE COURT: Well, certainly in view of that, Mr. Albright, you may be excused.

MR. ALBRIGHT: Thank you, sir.

THE COURT: Thank you. [Tr. 147].

* * * * *

JUROR NO. 10 (ELIZABETH M. MILLER): Yes.

THE COURT: I will ask you the questions I have been asking. And you have heard all of the questions and statements that have been made here today? Would your answer to any question be any different than the other persons in the jury box?

MS. MILLER: Yes, I am afraid I have read enough about it that I would be unable to be fair.

THE COURT: So that you feel that you have some opinion that you might have difficulty with?

MS. MILLER: Yes, sir.

THE COURT: Thank you very much indeed, Ms. Miller, for your frankness. You may be excused [Tr. 157].

* * * * *

ALTERNATE NO. 1 (WALTER KENNETH MILLER): Yes.

THE COURT: Has anything suggested to you any reason you would have trouble being fair if selected as a juror?

MR. MILLER: Due to the extent of the coverage of the press, I have already formed an opinion. I feel like I would be an affected witness.

THE COURT: Very well, you may be excused [Tr. 267].

In addition, the court made the following cautionary remarks to the venire regarding bias, each petitioner's right to individual consideration, and the presumption of innocence:

It would be difficult or impossible for you to be fair and impartial if you had heard or read anything about this case and had reached any kind of a firm conclusion concerning it, or if you had a friend or relative who was involved either as a party or as a member of counsel or as a witness, particularly an important witness in this case. [Tr. 186.]

Ladies and gentlemen of the jury panel, I want to emphasize one line of inquiry which I may or may not have made sufficiently clear this morning. And I don't want to leave it to chance.

But we, of course, emphasize the fact that there are three individual defendants in this case, Mr. Blanton, Mr. Hood, and Mr. Allen. Now, the fact that they have been charged jointly does not mean in any sense that they need to be found guilty or not guilty. The charges against them are individually. And in returning a verdict, it will be necessary for you to consider all of them separately and to consider the case against the three defendants as individuals. [Tr. 106.]

One aspect of the laws of the greatest possible importance—and I therefore emphasize it to you separately. That aspect concerns the presumption of innocence which is possessed by these defendants. In these United States, every person is presumed to be innocent until and unless he is proven guilty beyond a reasonable doubt.

The returning of an indictment brings the person named before a court and jury for trial. But the returning of that indictment in no way destroys or impairs the presumption of innocence of the persons named. Thus, these three defendants, in spite of the returning of an indictment, continue to possess that presumption of innocence. And I ask each of you whether you have any difficulty in according to those three defendants or to any one of them the presumption of innocence to which they and he are entitled?

I assume from your silence that you do not. But to be absolutely certain, let me specifically ask of you whether as you look at Mr. Blanton, Mr. Hood, and Mr. Allen, as they are seated before you, do you have difficulty in regarding them as innocent of the charges in the indictment? And will you have any difficulty at all in according to them the presumption of innocence throughout this entire trial?

I repeat, ladies and gentlemen, that we regard that question as of the greatest importance. And I take it from your silence that you have no difficulty in according a presumption of innocence which has been described. [Tr. 62-63.]

Finally, as the en banc court observed (Pet. App. 50a), in addition to "extensive questioning concerning prior media impact and juror associations, coupled with many dismissals based on even hints of

possible prejudice," the court also granted "very substantial increases in the number of peremptory challenges available to each defendant" (10 for each, or 30 in all, of which 28 were exercised), and was sensitive to petitioners' challenges for cause based on their use of "detailed questionnaires concerning all potential jurors." See, *e.g.*, Tr. 64-69.

b. Against this background it is apparent that the district court did not commit reversible error solely because it declined to conduct an individual voir dire of each member on the question of pretrial publicity. See *United States* v. *Liddy*, 509 F.2d 428, 434-437 (D.C. Cir. 1974); *Margoles* v. *United States*, 407 F.2d 727, 732 (7th Cir.), cert. denied, 396 U.S. 833 (1969). Cf. *McCorquodale* v. *Balkcom*, 721 F.2d 1493 (11th Cir. 1983). As the original panel recognized, the pretrial publicity, though pervasive, "was not such that it was inherently prejudicial. It was [rather] * * * mostly factual and some of it was as critical of [petitioners'] chief accuser as it was of [petitioners]" (Pet. App. 20a). Cf. *Murphy* v. *Florida*, 421 U.S. 794, 800-801 n.4 (1975) ("we have in the past distinguished largely factual publicity from that which is invidious or inflammatory"); *Beck* v. *Washington*, 369 U.S. 541, 556 (1962). Despite their objection to pretrial publicity, petitioners did not request the court to sequester the jury (Tr. 17-19, 32-33). They did request, and received, a three-month continuance of the trial (R. 43), a "technique[] that can effectively mitigate any publicity." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 602-603 (1976) (Brennan, J., concurring).

Moreover, though the jurors were not questioned individually about their exposure to publicity, they were repeatedly asked as a group about its possible effects. And in nearly 300 pages of voir dire there is

no indication of such "hostility to petitioner[s] by the jurors who served in [their] trial as to suggest a partiality that could not be laid aside." *Murphy* v. *Florida*, 421 U.S. at 800. As the en banc court noted (Pet. App. 61a):

> [T]he contrast between *Irvin* v. *Dowd*, [366 U.S. 717 (1961)], and [the] instant case is very great. In the *Irvin* case, Justice Clark pointed out:
>
> > Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, cf. *Stroble* v. *California*, 343 U.S. 181, was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations.
>
> In our present case *no* juror who helped determine the case expressed a pretrial conviction of [petitioners'] guilt.[8]

At the conclusion of the voir dire the court noted: "I have the view that the Jury that has been selected is as fair and impartial a Jury as could be obtained" (Tr. 291). See *Irvin* v. *Dowd*, 366 U.S. at 724

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[8] The court also observed (Pet. App. 65a):

> At the en banc hearing of this case, the author of this opinion asked lead counsel for Governor Blanton whether there was evidence of jury bias. The response was made wholly in relation to one juror and cited evidence which we deem quite inconclusive. We have searched this record for any other such evidence pertaining to periods before, during, or posttrial and have found none.

("findings of impartiality should be set aside only where prejudice is 'manifest' "). That observation is substantiated, in part, by the record of the jury's deliberations. The jury took seven days before returning a verdict; it ultimately acquitted Hood on four counts. A Nashville newspaper reported interviews with several jurors two days after they returned their verdict (R. 167, Exh. A). In that article the jurors described the steps they went through during their deliberations. It is apparent from their comments that their verdict was based on a careful examination of the evidence at trial, rather than on any preconceived notion of petitioners' guilt.

2. Petitioners nevertheless contend (83-858 Pet. 15-21; 83-860 Pet. 12-14) that the district court's failure to conduct an individual voir dire of each juror forced the court to accept the jurors' own assurances of impartiality. This result, they argue, conflicts with decisions in the First, Second, Fifth, Seventh, and Ninth Circuits. This contention is without merit.

None of the cases cited by petitioners holds that individual voir dire is inevitably required in the event of pretrial publicity.[9] Indeed it cannot be, since the

[9] In *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969), the court, while expressing its view of the desirability of such a practice, affirmed the defendants' convictions. In *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364, 372 (2d Cir.) (en banc), cert. denied, 372 U.S. 978 (1963), a case involving "highly inflammatory" publicity where eight of 16 jurors and alternates had formed an opinion of the defendant's guilt, the court of appeals held that the trial court should not have accepted the jurors' assurance of impartiality "in light of the nature of the publicity, the high proportion of jurors holding opinions of guilt, the length of time the opinions had been held and their per-

effect of publicity will vary greatly depending on its extent, content, and slant, the size of the community from which the jury is drawn, the nature of the crime, the time elapsed between publication and trial, and numerous other matters. The scope of inquiry must necessarily be determined in the first instance by the trial judge, who, after assessing these matters and the venire's response to his initial questions, can

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sistence." In *United States* v. *Davis*, 583 F.2d 190, 196-197 (5th Cir. 1978) (footnotes omitted), the court stated that "[t]hough separate examination of the jurors is sometimes preferable, it is not necessarily required." See also *United States* v. *Hawkins*, 658 F.2d 279, 285 (5th Cir. 1981) ("this does not mean that every case involving exposure to pretrial publicity automatically requires * * * 'time consuming, probing * * * individual voir dire' "). In *United States* v. *Dellinger*, 472 F.2d 340, 376-377 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), the court stated that individual questioning "is of course one method. But even without individual questioning, the court could probe the impact of pretrial publicity without requiring the veniremen to describe what they had heard." *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968), was another case involving publicity "particularly adverse" to the defendant (400 F.2d at 631), where "almost thirty per cent of those examined expressed opinions of [the defendant's] guilt" (*id.* at 639). The court of appeals went no further, though, than to say that "under the circumstances of this case" (*ibid.*) it was an abuse of discretion not to interview the jurors individually, and that "we would *prefer*" more general use of such a procedure (*id.* at 639) (emphasis in original).

The other cases cited by petitioners (83-858 Pet. 18-19; 83-860 Pet. 12) are ones in which the defendants' convictions were affirmed. *United States* v. *Provenzano*, 620 F.2d 985 (3d Cir. 1980); *Brinlee* v. *Crisp*, 608 F.2d 839 (10th Cir. 1979) (affirming denial of habeas relief); *United States* v. *Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974); *United States* v. *Liddy*, 509 F.2d 428, 434-437 (D.C. Cir. 1974); *United States* v. *Bryant*, 471 F.2d 1040, 1043-1045 (D.C. Cir. 1972), cert. denied, 409 U.S. 1112 (1973).

best decide on the spot how exhaustive an examination to undertake in light of the likelihood and evidence of bias.

In some of the cases cited by petitioners the voir dire was so inadequate that it simply gave no " 'reasonable assurance that prejudice would be discovered if present.' " *United States* v. *Hawkins*, 658 F.2d 279, 283 (5th Cir. 1981). See *United States* v. *Davis*, 583 F.2d 190, 196 (5th Cir. 1978) (trial court asked once whether the jury was affected by publicity; no juror responded); *United States* v. *Dellinger*, 472 F.2d 340, 372, 375 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (no reference to pretrial publicity at all; one general question whether the jury could be impartial). In this case, by contrast, the court raised the issue each time a new prospective juror or group of jurors entered the box—19 times in all. At the request of defense counsel, he also asked about pretrial publicity concerning the Blanton administration generally (Tr. 104-105).

In others of the cases cited by petitioners, there was convincing evidence of a pervasive prejudice that warranted further inquiry. See *United States ex rel. Bloeth* v. *Denno*, 313 F.2d at 367-368 (eight of 16 regular and alternate jurors had formed an opinion of guilt; 31 of 38 others questioned shared that opinion); *Silverthorne* v. *United States*, 400 F.2d at 639 ("almost thirty per cent of those examined expressed opinions of appellant's guilt"). Here the trial court expressed its willingness to undertake further inquiry if the voir dire showed it was justified (Tr. 31-32). But at the conclusion of the process the judge reflected that it would have been unwarranted. (Tr. 292) ("[I]t's anybody's guess as to which way they

are leaning. I could see no real indication from the vantage point of the bench as to whether they favored the defense or the Government.").

Moreover, it is mistaken to suggest that this is even a case where the trial court was satisfied with the jurors' own subjective assessment of their impartiality. It is true that the judge did not probe each individual's mind for evidence of bias. But the transcript of the voir dire reveals that the court excused not only those who felt they could not be impartial, but also every juror who had even formed an opinion about the case—an approach that is more protective of petitioners' interests than the constitutional rule laid down in *Irvin* v. *Dowd*, 366 U.S. at 723 (juror not disqualified by "the mere existence of [a] preconceived notion as to the guilt or innocence of an accused"). Nor is this a case in which individual jurors were reluctant to respond to questions put to the panel. Of the 92 prospective jurors interrogated, 42 gave responses that enabled the court to remove them for cause—13 of those because they stated they held an opinion, or a prejudice, about the case.

3. Petitioners also argue (83-858 Pet. 22-25; 83-860 Pet. 15) that the trial court's failure to inquire further into the matter of pretrial publicity impaired their right of peremptory challenge. This claim too is without merit.

It is important at the outset to clarify the nature of petitioners' argument. Under Fed. R. Crim. P. 24(b) petitioners were entitled as a matter of right to a total of ten peremptory challenges. At their request the trial judge granted them 30 (Pet. App. 57a). The court also allowed petitioners to have copies of the official questionnaires filled out by the prospective members of the jury—information to

which again they had no claim of right at the voir dire stage. 2 Wright, *Federal Practice and Procedure* § 382, at 343-344 (1982). Petitioners do not argue that they were actually restricted in their right to use peremptory challenges. Cf. *United States* v. *Turner*, 558 F.2d 535 (9th Cir. 1977). They claim rather that they could have used their challenges to greater effect if they had had more information about how pretrial publicity may have affected each individual juror.

That is a claim that could be made regardless of the extent of the court's examination. For that reason it is not useful to examine the adequacy of the voir dire by asking whether more information would have contributed to the effective exercise of peremptory challenges. See *McDonough Power Equipment, Inc.* v. *Greenwood*, No. 82-958 (Jan. 18, 1984), slip op. 7-8. The only relevant question is whether the examination of prospective jurors gave " 'reasonable assurance that prejudice would be discovered if present.' " *United States* v. *Hawkins*, 658 F.2d at 283. As we have already made clear, the voir dire here provided sufficient assurance in that regard. None of the cases cited by petitioners requires more. See *United States* v. *Johnson*, 584 F.2d 148, 155 (6th Cir. 1978); *United States* v. *Blount*, 479 F.2d 650, 651 (6th Cir. 1973); *United States* v. *Dellinger*, 472 F.2d at 366-370.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1983

LEONARD RAY BLANTON
CLYDE EDWARD HOOD, JR.
and JAMES M. ALLEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IN A FEDERAL CRIMINAL TRIAL INVOLVING MASSIVE PREJUDICIAL PUBLICITY DOES THE TRIAL JUDGE ADEQUATELY PROTECT THE DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL JURY WHEN HE REFUSES TO ASK ANY OF THE PROSPECTIVE JURORS WHETHER THEY HAD PREVIOUSLY FORMED AN OPINION ABOUT THE GUILT OR INNOCENCE OF THE DEFENDANT, THE NATURE AND EXTENT OF ANY SUCH OPINION IF HELD, OR THE SOURCE AND INTENSITY OF EXPOSURE TO THE PREJUDICIAL PUBLICITY, AND INSTEAD MERELY ASKS THE JURORS, EN MASSE, WHETHER THEY FEEL THEY COULD SET ASIDE ANY SUCH OPINION.

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United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICI

This brief is in support of the petition for Writ of Certiorari sought by the defendants in this case and is filed on behalf of the Tennessee Association of Criminal Defense Lawyers and joined in by the Alabama Association of Criminal Defense Lawyers. Pursuant to Rule 26.1 of this Court's Rules, letters of consent have been obtained from the parties and are filed with this brief.

The Tennessee Association of Criminal Defense Lawyers is a non-profit corporation organized under the laws of the State of Tennessee, whose members are licensed attorneys engaged in the defense of criminal cases. According to the by-laws the purposes of the corporation are, *inter alia,* to protect those individual rights guaranteed by the United States and Tennessee Constitutions, and to promote justice and the common good through cooperation, education and assistance. The Alabama Association of Criminal Defense Lawyers is a group of attorneys organized for similar purposes.

The interest of the amici in this case stems from the "unprecedented"[1] curtailment of voir dire in a case involving the quantity and quality of prejudicial publicity presented here. The amici fear that this case may in the future stand as authority for virtually any type of limitation whatsoever on voir dire, including perhaps ultimately authorizing a voir dire consisting of only one question. The decision in this case effectively eliminates the concept of voir dire as a valuable tool in obtaining a fair and impartial jury and in overcoming the effects of negative pretrial publicity.

The amici feel that this case has potential to impact significantly on the administration of criminal justice inasmuch as the decision of the Sixth Circuit sanctions the curtailment of procedures designed to insure the right to trial before a fair and impartial jury in a case where cautionary measures were most needed to insure protection of that right.

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[1] Quoting from J. Engel's dissent for en banc minority in the Sixth Circuit.

ARGUMENT

A. INTRODUCTION

This case presents issues concerning whether adequate procedures were taken by the trial judge to assure the selection of a fair and impartial jury in the trial of the Ex-Governor of the State of Tennessee, Ray Blanton, and two of his aides for violation of federal mail fraud, extortion, and conspiracy statutes. The nature and extent of the massive prejudicial publicity in this case has been adequately characterized in the opinion of the Sixth Circuit Court of Appeals as well as in the individual defendant's petitions for Writ of Certiorari to this Court. For introductory purposes relating to this brief it is enough to simply state that the publicity in the State of Tennessee was indeed massive and highly inflammatory, involving prejudicial allegations not only pertaining to the defendants' involvement in this case, but also allegations of involvement in other collateral matters such as the alleged participation of the Governor in the sale of pardons and paroles to state inmates.

Prior to trial, counsel for the defendants made timely written and oral motions in the trial court for individual voir dire of the jurors as to their exposure to the massive pretrial publicity.[2] The trial judge not only denied this request, but went even further, and refused to ask questions proposed by the defendants which were designed to identify those jurors that had already formed an opinion as to the defendant's guilt or innocence, determine the nature and extent of any such opinion and, determine the extent to which the individual jurors had been exposed to such publicity. Instead, the trial judge only made a generalized in-

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[2] Indeed, the record in this case substantiates the statement in defendants' Hood and Allen's petition that the pretrial publicity "was massive and adverse to a degree probably unprecedented in Tennessee judicial history." Petition for Writ of Certiorari on Behalf of Hood and Allen, page 2.

quiry of the jurors, en masse, as to whether or not they could set aside any such previously formed opinion and make a decision solely on the evidence presented in the courtroom.

The trial judge, in effect, decided to allow the jurors to subjectively make their own determination as to their impartiality, irregardless of either the nature and extent of their exposure to the publicity or as to the nature and extent of any opinion which the juror may have already formed. In so doing, the trial judge abdicated his responsibility of assuring a fair and impartial jury, inhibited the development of any meaningful information by which defense counsel could discharge their duty in this regard, and effectively precluded any appellate court from making its own objective, informed determination of the jury's impartiality. This case does present issues which have split other courts and which do not appear to have been previously decided by this Court, see parts B and C, infra. However, the refusal of the trial judge to meaningfully participate in or allow defense counsel to meaningfully participate in the determination of the jurors' impartiality has not been previously sanctioned by any federal court in a case involving the kind of prejudicial publicity presented here. The refusal of the trial judge to even ask the jurors whether they had previously formed or expressed an opinion concerning the case and to attempt to determine the nature and extent of any such opinion violated the defendants' Sixth Amendment rights to a fair and impartial jury and the effective assistance of counsel, impaired their right to the intelligent exercise of peremptory challenges, and was historically inconsistent with the administration of justice in the federal system.

B. THE DECISION OF THE SIXTH CIRCUIT COURT IN THIS CASE CONFLICTS WITH PRIOR APPLICABLE DECISIONS OF THIS COURT.

1. Prior decisions of this Court indicate that the trial judge was required at a minimum to identify those prospective jurors who had previously formed opinions concerning the defendants' guilt or innocence and inquire into the nature and strength of any such opinion in order to adequately assure the defendants' Sixth Amendment right to a fair and impartial jury.

The Sixth Amendment right to a fair and impartial jury presupposes at a minimum that the jurors have not previously formed an opinion concerning the defendant's guilt or innocence which will interfere with their ability to fairly try the case on the evidence presented in court. While, in rare cases, this Court has indicated that a presumption of partiality may even arise without resort to an examination of the voir dire, see *Rideau* v. *Louisiana*, 373 U.S. 723, 10 L.Ed.2d 663 (1963), the general rule seems to be that the voir dire is the procedure used to evaluate whether or not a juror is truly impartial. *Irvin* v. *Dowd*, 366 U.S. 717, 6 L.Ed.2d 751 (1961). Indeed, a "searching" voir dire of prospective jurors concerning the effects of pretrial publicity is one of the methods which is to be utilized to insure the delicate balance between the often competing interests of freedom of the press and a defendant's right to a fair trial. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 564-5, 49 L.Ed.2d 683 (1976). While a juror who has previously formed an opinion may not necessarily be disqualified, if he can set such opinion aside, *Irvin* v. *Dowd*, *supra*, the juror's bare assertion of such impartiality is not dispositive, and a defendant has a right to attempt to demonstrate the juror's actual, though perhaps undisclosed, bias. See *Murphy* v. *Florida*, 421 U.S. 794, 44 L.Ed.2d 589 (1975), *Irvin* v. *Dowd*, *supra*, *Marshall* v. *United States*, 360 U.S. 310, 3 L.Ed.2d 1250 (1959). Where the threshold voir dire inquiry indicates the existence of a preex-

isting opinion on the part of the juror, the next step is to inquire into the nature and strength of that opinion to determnine its impact on the juror's impartiality, and whether the juror's assurance of such impartiality can reasonably be relied upon. *Irvin* v. *Dowd.*

The decision of the trial judge in this case to ask the jurors only whether they could set aside any preexisting opinions concerning the defendants' guilt or innocence and further to simply accept, without further inquiry, their positive responses thereto, is in direct conflict with this Court's teachings in *Irvin* and *Murphy*. The refusal to even make a rudimentary inquiry into the nature and strength of any previously held opinions precluded the trial judge from effectively exercising his responsibility of making an informed decision as to the actual impartiality of the jurors, and equally importantly, foreclosed meaningful appellate review of the jurors' impartiality. See *Irvin* v. *Dowd, supra,* 366 U.S. at 723, ("duty of the Court of Appeals to independently evaluate the voir dire testimony of the impanelled jurors").

Comparison of this case with *Irvin* illustrates the dangers associated with the procedure used here. Eight of the twelve jurors selected in the *Irvin* case stated on the voir dire examination that they held an opinion that the defendant was guilty, even though they stated they could set such opinion aside, and ninety percent of the total prospective jurors examined stated that they had an opinion concerning the defendant's guilt, ranging from intense to mere suspicion. Under these circumstances, despite the jurors assurances of impartiality, this court held that there was a presumption of partiality and indicated that the defendant's trial should have been transferred to another community. Had the trial judge in *Irvin* followed the procedure here, and not asked any questions to determine whether the prospective jurors held an opinion concerning the defendant's guilt or innocence, or the nature and extent of such opinion, there would have been no voir dire information for this court to evaluate and the trial judge's action would have been simply

non-reviewable, as here. The opinion of the Sixth Circuit misses this crucial point when, in attempting to distinguish *Irvin*, it states: "In our present case *no* juror who helped determine the case expressed a pretrial conviction of appellants' guilt." (Petition for Writ of Certiorari of Hood and Allen, Appendix, p. 29) (emphasis in original). This reason is obvious. *They weren't asked* if they had already formed an opinion concerning the defendants' guilt or innocence. In fact, as J. Engel notes in his dissent, the jurors were admonished not to volunteer any information and only respond directly to the questions asked. (Petition for Writ of Certiorari of Hood and Allen, Appendix p. 37). Perhaps all twelve jurors selected had an opinion that the defendants were guilty and perhaps all of these opinions were intensely held. There is simply no way to tell as the trial judge refused to make any such inquiry.

Likewise, in *Murphy*, the trial judge did identify those jurors with previously formed opinions and determined the nature and strength of those opinions.

This Court's decisions in *Irvin* and *Murphy* when read together hold that while jurors with preconceived opinions concerning a defendant's guilt or innocence are not automatically disqualified if they state they can set such opinion aside, their assertions of impartiality are not necessarily dispositive where inquiry into the nature and strength of that opinion fails to give reasonable, objective assurances of that impartiality. The decision of the trial judge in this case for foreclosure any such inquiry conflicts with the procedures established by this Court to provide such reasonable assurances of impartiality.

2. Prior decisions of this Court indicate that the procedure followed by the trial judge improperly infringed upon the defendants' right to exercise peremptory challenges as guaranteed by the *Federal Rules of Criminal Procedure*.

The original panel of the Sixth Circuit which reversed this conviction held that the procedure followed by the trial judge

not only was inadequate to assure the defendants' right to a fair and impartial jury under the Sixth Amendment, but also inadequate to secure the defendants' right to intelligently exercise peremptory challenges, *F.R.Crim.P.* 23. See *Blanton* v. *United States,* 700 F.2d 298 (1983).

This Court has recognized that voir dire operates "as a predicate for the exercise of peremptory challenges" and that the concept of the peremptory challenge is such an ingrained part of our judicial system that "the denial or impairment of the right is reversible error without a showing of prejudice." *Swain* v. *Alabama,* 380 U.S. 202, 219, 13 L.Ed.2d 759 (1965). While not constitutionally required, the peremptory challenge is intimately tied to the Sixth Amendment guarantee of a fair and impartial jury in that the challenge serves "to eliminate extremes of partiality on both sides." *Swain* v. *Alabama, supra,* 380 U.S. at 219. Voir dire serves as the mechanism for eliciting sufficient information to enable counsel to intelligently determine when to exercise a peremptory challenge a strike a juror whom counsel may feel is not impartial, even though the existence of such partiality may not be demonstrable to the degree necessary to justify challenge for cause.

A procedure whereby the trial judge refuses to even identify those jurors who have previously formed an opinion or permit any inquiry into the nature and strength of such opinion effectively abrogates any meaningful exercise of "one of the most important of the rights secured to any accused", *Pointer* v. *United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208, and thus constitutes, if not a total denial, then at least a severe impairment of the right of peremptory challenge contrary to previous decisions of this Court.

3. Prior decisions of this Court indicate that the procedure followed by the trial judge deprived the defendants of their Sixth Amendment right to the assistance of counsel in that the defendants were, in effect, deprived of the "guiding hand of counsel".

In *Brooks* v. *Tennessee*, 406 U.S. 605, 32 L.Ed.2d 358 (1972), this Court held that a statute which required the defendant to be the first witness for the defense or be precluded from testifying at all, violated due process in that it deprived the accused of "the guiding hand of counsel at every step in the proceedings against him", 406 U.S. at 612-13. Requiring the defendant and his attorney to prematurely make "the important tactical decision" as to whether the defendant should testify without adequate opportunity to properly evaluate the need for his testimony by considering such factors as how the other defense witnesses performed, was said to be an unconstitutional restriction on the role of the defense counsel in providing meaningful representation. *Brooks* v. *Tennessee*, 406 U.S. at 612.

Likewise, the procedure followed here effectively deprived the defendants of "the guiding hand of counsel" in that counsel was basically left without any information to properly evaluate "the important tactical decision" as to which jurors should either be challenged for cause or excluded by use of peremptory challenges. Without knowing whether the prospective jurors had already formed or expressed an opinion concerning their client's guilt, defense counsel could not provide any meaningful guidance in selecting a fair and impartial jury. A procedure which, in effect, excludes counsel from any meaningful participation in making such an important tactical decision conflicts with this Court's previous decision in *Brooks* v. *Tennessee, supra.*

4. The procedure followed by the trial judge departed from the accepted and usual course of judicial procedure to such an extent as to call for the exercise of this Court's supervisory powers over the administration of federal criminal justice.

This case presents a federal criminal conviction and thus the standard of review is less stringent that the review of state criminal cases. While the above authority indicates that the procedure followed in this case was constitutionally deficient and thus unacceptable even in state cases, this Court's decision in *Marshall* v. *United States,* 360 U.S. 310, 79 S.Ct. 117, 3 L.Ed.2d 1250 (1959) provides additional authority for consideration of this case pursuant to the Court's supervisory powers over the administration of federal criminal justice. In *Marshall* this Court reversed a conviction pursuant to it's supervisory powers, where jurors were exposed during trial to news articles referring to prior convictions of the defendant, despite the assurances of the jurors that they would not be affected thereby.

Inasmuch as the trial judge in this case did not undertake to conduct any inquiry into the nature and degree of exposure of the prospective jurors to the massive prejudicial publicity in this case, the precise nature of any such exposure will never be known. However, from the record in this case, including the articles attached to the defendants' various motions, it can be safely assumed that many of the prospective jurors were exposed to material equally as prejudicial as that to which *Marshall* jurors were exposed. The trial judge's failure to conduct any appropriate and meaningful inquiry into the effects of this massive prejudicial publicity would appear to conflict with this Court's decision in *Marshall* v. *United States, supra,* and calls for the exercise of this Court's supervisory powers.

C. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN PREVIOUSLY DECIDED BY THIS COURT CONCERNING PROCEDURES TO BE UTILIZED TO INSURE THE SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY IN CASES INVOLVING MASSIVE, PREJUDICIAL PUBLICITY.

While the refusal of the trial judge to inquire as to whether any prospective jurors had previously formed an opinion or as to the nature and extent of such opinion directly contravenes previous decisions of this Court, other important issues are presented concerning the conduct of the voir dire in this case which do not appear to have been previously decided by this Court. As discussed in part D, infra, the Courts of Appeals have split when presented with issues as whether jurors should be asked about the nature and extent of their exposure to prejudicial pretrial publicity, whether the jurors should be asked "content" questions, that is what they remember about the publicity to which they have been exposed, and whether or not the voir dire of such jurors should be conducted individually out of the presence of the other prospective jurors.

D. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH DECISIONS OF THE OTHER COURTS OF APPEALS.

The decision in this case conflicts with decisions of other Courts of Appeals in several respects. Some aspects of the decision such as the affirmance of the trial judge's refusal to ask prospective jurors whether they had formed an opinion concerning the case, or to inquire as to the nature and extent of any such opinion, puts the Sixth Circuit in direct conflict with every other Circuit that has ruled on the issue. Other related questions relating to the conduct of voir dire in this case, such as whether the prospective jurors should have been asked questions concerning the precise nature of their exposure to the pretrial publici-

ty, specifically what they remembered from such exposure, and whether the voir dire examination in this area should have been conducted on an individual basis, have split the circuits.

No other Circuit has approved a voir dire as circumscribed as the one conducted in this case where a significant possibility exists that the prospective jurors have been exposed to prejudicial pretrial publicity. The First, Fifth, and Seventh Circuits have specifically overturned convictions where the trial judge, as here, merely asked a conclusory question as to whether the jurors could be fair and impartial and made no attempt to conduct any meaningful assessment of their response. *Patriarca* v. *United States*, 402 F.2d 314 (1st Cir. 1968); *United States* v. *Davis*, 583 F.2d 190 (5th Cir. 1978); *United States* v. *Hawkins*, 658 F.2d 279 (5th Cir. 1981); *United States* v. *Lewin*, 467 F.2d 132 (7th Cir. 1972); *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972). In *Patriarca*, the court noted the shortcomings of such a limited inquiry.

> A single question imposed to the panel en bloc, with an absence of response, does little or nothing by way of identifying, weighing, or moving any prejudice from prior publicity. 402 F.2d at 318.

The reason that such a limited inquiry is insufficient to protect the defendant's right to a fair and impartial jury is that jurors don't easily admit impartiality in a public forum.

> This obligation [to determine that the jurors are free of impartiality] would not seem to be discharged by general direct confrontational questions on human characteristics that most people are reluctant to admit that they possess. *U.S.* v. *Lewin*, 467 F.2d at 1138.

The Ninth Circuit has similarly held that such a limited voir dire does not suffice in cases involving significant pretrial publicity even though in the case presented there the trial judge had at least inquired as to whether the jurors had formed an opinion and as to whether they had discussed the case with others. The court noted that "merely going through the form of obtaining assurances was not enough". *Silverthorne* v. *United States,* 400 F.2d 627 (9th Cir. 1968).

An examination of several other cases which have rejected defendant's challenges to the adequacy of voir dire procedures in cases involving massive pretrial publicity indicates that the trial judge had indeed made at least a de minimus inquiry into whether the prospective jurors had formed an opinion concerning the case, the nature and extent of any such opinion, and often the nature and extent of the juror's exposure to the pretrial publicity. *See United States* v. *Bryant,* 471 F.2d 1040 (D.C. Cir. 1972) (adopting ABA Standard Relating to Fair Trial and Free Press, 3.4(a) 1968); *United States* v. *Liddy,* 509 F.2d 428 (D.C. Cir. 1974) (the trial judge did commence voir dire by individually questioning the jurors and the examination revealed that they remembered little and had not formed an opinion); *United States* v. *Haldeman,* 559 F.2d 31 (D.C. Cir. 1979) (trial judge did inquire as to whether jurors had formed or expressed an opinion, whether they remembered anything they had heard or read, the papers and magazines they had read, whether they had specifically discussed the case with anyone, and other specific questions to determine their knowledge); *United States* v. *Addonizio,* 451 F.2d 49 (3rd Cir. 1972) (trial judge did ask whether or not the jurors had previously formed an opinion, the nature and extent of their exposure to pretrial publicity, and the effect of such exposure on them); see also *United States ex rel. Bloeth* v. *Denno,* 313 F.2d 364 (2d 1963) (voir dire of jurors concerning the nature and extent of previously formed opinion demonstrated existence of partiality despite jurors' contrary assertions).

While the Circuits have unanimously agreed that the determination of impartiality cannot be totally delegated to the jurors themselves, there has been a split of authority on related questions concerning the conduct of voir dire in cases involving significant prejudicial publicity. Several circuits, by either adopting Section 8.35 of the ABA Standards Relating to Fair Trial and Free Press (formerly section 3.4) or some variation thereof, have held that that individual questioning of jurors outside the presence of the other prospective jurors is required with respect to exposure to pretrial publicity. *See United States* v. *Liddy, supra,* (whenever there is a "significant possibility" of exposure to potentially prejudicial material); *Silverthorne* v. *United States, supra; Patriarca* v. *United States, supra.* However, other Circuits have held that individual voir dire is not necessary even in cases of massive publicity as the impact of such pretrial publicity can be assessed without requiring a prospective juror to describe that publicity. *See United States* v. *Dellinger, supra; United States* v. *Harris,* 542 F.2d 1283 (7th 1976) (individual voir dire "commended" though not required); *United States* v. *Davis, supra,* (discretionary with trial judge).

The Circuits have also split as to whether "content" question should be asked on voir dire, that is whether the prospective jurors should be asked what they recollect concerning the pretrial publicity. *Contrast Silverthorne* v. *United States, supra* (such questions normally required in cases of prejudicial pretrial publicity); *United States* v. *Johnson,* 584 F.2d 148 (6th 1978) (required if specific articles produced and juror's exposure not readily apparent from other questions); *with United States* v. *Addonizio, supra* (content questions held not required where the publicity was not particularly relevant); *United States* v. *Haldeman, supra* (content questions not required).

E. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF NUMEROUS STATE COURTS AND WITH STANDARDS ESTABLISHED BY THE PROFESSION.

This case derives its uniqueness not from the problem which confronted the trial judge, but rather from the solution which he chose. Problems inherent in attempting to implement the constitutional guarantee of a fair and impartial jury in the face of massive prejudicial publicity have long been discussed by the judiciary and trial bar. In response to the Warren Commission's call for a Code of Conduct to govern the press and attorneys, the ABA formed a committee whose report formed the basis of the ABA Standards Relating to Fair Trial and Free Press. After surveying the psychological and sociological literature, the committee concluded that an opinion, once formed, was often resistent to change and that new information imparted often was unconsciously manipulated in order to confirm the previously held opinion. See, ABA Advisory Committee on Fair Trial and Free Press, 60-67 (1968).

As a result Standard 8-3.5 (formerly 3.4) of the ABA Standards Relating to Fair Trial and Free Press requires that jurors be examined individually where there is a "substantial possibility" of exposure to potentially prejudicial material. The standard goes on to suggest that in such cases prospective jurors be asked what they have read and heard about the case and that inquiry be conducted to determine the effect of such exposure on the prospective juror's state of mind. Both the degree of exposure and the juror's own testimony as to his state of mind are said to be relevant to a determination of his acceptability. Thus, this standard proposes both a subjective and an objective test. The problem with the procedure followed here is that the trial judge only made the subjective inquiry and failed to elicit any information to enable objective assessment of the juror's assurances.

This Court has also often recognized that where a practice or procedure is widely followed by the states, this may be persuasive evidence that it is required by basic fairness or due process. See *Aldridge* v. *United States* 283 U.S. 308, 313, 75 L.Ed. 1054 (1931) (fact that voir dire inquiry then under consideration was permitted "in all sections of the country...attests to the widespread sentiment that fairness demands that such inquiries be allowed); *Mapp* v. *Ohio,* 367 U.S. 643, 651, 6 L.Ed.2d 1081 (1961).

Without attempting to catalogue each state's approach to voir dire in cases involving exposure to prejudicial publicity, the amici would simply point out that the procedure authorized by the Sixth Circuit in this case has been rejected by numerous state courts which have considered the problem. See *State* v. *Pokini* 526 P.2d 94 (1974 Hawaii)(question eliciting response of juror solely as to their subjective ability to be fair is not enough in cases involving substantial pretrial publicity); *Sommerville* v. *State* 521 S.W.2d 729 (Tn. 1975); *Young* v. *State* 407 A.2d 517 (Del. 1979)(jurors' assurances not enough; objective information should be elicited); *Mallott* v. *State* 608 P.2d 737 (Alaska 1980)(ABA Standard adopted); *State* v. *Littlefield,* 374 A.2d 590 (Maine 1977) (ABA Standard adopted); *State* v. *Goodson,* 412 So.2d 1077 (La. 1982)(ABA Standard adopted); *People* v. *Taylor* 447 N.E.2d 519 (Ill.App. 1983)(jurors' assurances held insufficient); *State* v. *Yurk,* 638 P.2d 921 (Kan. 1982)(juror's assurance that he could ignore prejudicial information in news article appearing during trial held insufficient); *Odle* v. *Superior Court of Contra Costa County,* 654 P.2d 225 (Cal. 1982)(individual voir dire will allow the trial judge to adequately assess the juror's assurances of impartiality where the extent of exposure and impact can adequately be explored); *State* v. *Emery* 642 P.2d 838 (Ariz. 1982) (jurors' assertion of impartiality not dispositive); *Brandon* v. *State,* 599 S.W.2d 567 (Tx.Crim.App. 1979)(trial judge erred in not asking jurors whether they had previously formed an opinion as to the defendant's guilt or in-

nocence); *State* v. *Williams* 230 S.E.2d 742 (W.Va. 1976)(jurors' assurance of impartiality insufficient where juror was exposed to prejudicial article during trial).

F. THIS CASE PRESENTS ISSUES OF IMPORTANCE TO THE ADMINISTRATION OF CRIMINAL JUSTICE BEYOND THAT OF THE RESPECTIVE INTEREST OF THE PARTIES.

1. The decision of the Sixth Circuit in this case is based upon a fictitious assumption that is contrary to the experience of the trial bar and which has been repudiated by social science research.

Every experienced trial lawyer is aware of that which motivated this Court's decision in *Irvin*, namely that the simple assurance of impartiality by a juror in a situation such as that presented here cannot be blindly accepted without further inquiry designed to elicit more objective information. Often jurors have a hard time admitting that they cannot be impartial when asked such questions by strangers in a public forum and where a degree of disapproval may be attached to such an admission.

The negative effect of exposure to prejudicial pretrial publicity and jurors' reluctance to admit their biases in this regard have been confirmed by the social science research in the area. See ABA Advisory Committee on Fair Trial and Free Press, 60-67 (1968); *Simon*, "Does The Court's Decision In *Nebraska Press Association* Fit The Research Evidence On The Impact On Jurors Of News Coverage?", 29 *Stanford Law Review* (1976); *State* v. *Williams*, 459 A.2d 641, 655, fn 10 (N.J. 1983)(cataloging numerous empirical studies lending support to the conclusion that pretrial publicity does indeed bias the expressed jurors).

The procedure followed here ignored the realities present in selecting jurors in highly publicized cases and thus reduced this important part of the trial to a hollow ritual.

2. If the decision in this case is allowed to stand, future defendants will, in effect, be precluded from showing that their Sixth Amendment right to trial by a fair and impartial jury has been violated.

In *Murphy* v. *Florida, supra,* this Court noted that despite a juror's assurance of impartiality it is always open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as well as raise the possibility of impartiality." 421 U.S. at 800. The rule requiring that the defendant demonstrate the juror's impartiality before the juror's assurances will be disregarded seems fair enough on its face. However, when applied in the context of the procedure followed in this case, the result is self-defeating, as the defendant is denied the only way he can effectively demonstrate that partiality, i.e. by some sort of inquiry directed to discover whether the juror holds an opinion and, if so, the nature and extent of that opinion. The distinction Justice Marshall made long ago that jurors merely bearing "light impressions" are not necessarily unacceptable, while those with "strong and deep impressions" may be unable to objectively evaluate the evidence, is somewhat academic when no inquiry is even made to determine the strength of the previously formed opinion. See *United States* v. *Burr,* 25 Fed.Cas. 49, 50 (C.C.Va. 1807).

The amici are concerned that the decision in this case virtually precludes defendants from meaningfully asserting their right to a fair and impartial jury in cases involving pretrial publicity in that they are denied the means necessary to actually show such impartiality. Statements of this Court to the effect that "the juror's assurances of impartiality are not dispositive", see *Irvin, Murphy,* are meaningless in such a context.

3. The decision of the Sixth Circuit in this case would logically allow for the virtual elimination of voir dire from trial procedure.

A defendant's right to a fair and impartial jury is perhaps the most basic of all constitutional guarantees. The right not to have illegally seized evidence or unlawfully obtained confessions admitted into evidence and the right to the assistance of counsel, are of little or no value if the jury selected to try him is not fair and impartial. One can only wonder what benefit a defendant gets from having even the most highly incriminating piece of evidence excluded from the jury's consideration, if the jury is impartial in the first instance.

If, in a case such as this, involving the trial of an ex-Governor attended by massive prejudicial publicity, the trial judge can merely ask the jurors, in effect, if they can be fair and not make any attempt to explore the effect of that publicity, then this case potentially forbodes even more drastic measures in the future in the name of "judicial economy". If this decision stands, then it is authority for whatever limitations on voir dire any subsequent trial court seeks to impose. While it is customary to inquire in voir dire as to the prospective jurors' knowledge of the particular facts involved in the case, knowledge of the parties, relation to the attorneys, relation to law enforcement officers, and any other factor which might at least initially call into question their partiality, and then to follow up on any affirmative responses thereto, such inquiries would no longer be required. Trial judges could simply ask the prospective jurors one question, en masse:

> Notwithstanding the fact that you may have personal knowledge of the facts in this case, or may personally know the parties involved, or may know or have been previously represented by the attorneys, or may have previously discussed the facts with someone or may have previously formed an opinion as to this case, could you

nonetheless set these feelings or relationships aside and simply decide the case based on the evidence presented in Court.

The human characterization which motivates most prospective jurors to believe that they can be impartial despite any extraneous considerations, coupled with many juror's natural reluctance to admit impartiality in a public forum, would operate in most cases to evoke no response to such a question.

The amici simply contend that while such a procedure might result in a savings of both time and money, nonetheless the price to be paid is too great. The amici do not urge that this Court mandate lengthy and detailed questions in an attempt to reach the innermost recesses of jurors' minds, but only that in cases involving this kind of publicity that at least some minimal inquiry be made so as to inform the parties as to which prospective jurors have previously formed opinions and what the nature and extent of those opinions might be. The amici urge this Court to decide the extent to which it is permissible for a trial procedure to be implemented where the effect of that procedure raises serious questions as to whether basic constitutional guarantees have been protected.

G. CONCLUSION

For the above stated reasons the amici urge this Court to grant the Petitions for Writ of Certiorari to review the decision of the Sixth Circuit in this case.

Respectfully submitted,

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